No. 2176

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLPH KOSHLAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGELSANG, as Members of the Board of Supervisors of the City and County of San Francisco,

Appellants,

vs.

SPRING VALLEY WATER COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Second Division.

FILMER BROS. CO. PRINT., 330 JACKSON ST., S. F., CAL.

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INDEX TO PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLF KOSHLAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGELSANG, as Members of the Board of Supervisors of the City and County of San Francisco,

Defendants.

Bill in Equity.

To the Honorable, The Judges of the District Court of the United States, Northern District of California, Second Division:

The Spring Valley Water Company, a corporation,

as hereinafter stated, files this its bill of complaint against the City and County of San Francisco, a municipal corporation, the Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, [1*] George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as members of the Board of Supervisors of the City and County of San Francisco.

And thereupon your orator, said complainant, complains and avers as follows:

I.

That your orator is, and was at all the times hereinafter mentioned since the 14th day of September, 1903, a corporation duly incorporated under and in pursuance of the laws of the State of California, and that the Spring Valley Water Works was at all the times hereinafter mentioned, until the expiration of its term of existence, a corporation duly incorporated under and in pursuance of the laws of the State of California, and especially under an act of the legislature of the State of California entitled: "An Act for the Incorporation of Water Companies, approved April 22d, 1858," and that your orator on the 14th day of September, 1903, became, and ever since has been, and is now, by purchase and grant from said Spring Valley Water Works, and by additions

*Page-number appearing at foot of page of original certified Record.

thereto made by itself, the owner and in possession of, and in the occupation and use of, all the properties hereinafter described and referred to or referred to in any way for use in the corporate business of your orator in supplying said City and County of San Francisco and its inhabitants with pure fresh water. [2]

II.

That the City and County of San Francisco, defendant herein, is, and at all times hereinafter mentioned was, a municipal corporation duly incorporated under the laws of the State of California.

III.

That the defendants, Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, are and were on June 20, 1912, and ever since have been, the duly elected or appointed, qualified and acting Supervisors of the said City and County of San Francisco, and members of and constituting the Board of Supervisors of said city and county, and have been such members ever since on or about the 1st day of February, 1912.

IV.

That prior to the cession of California to the United States by the Treaty of Queretaro, the place where the City of San Francisco now stands was an open moor, the residents thereof not exceeding two

hundred in number. After the cession of the territory to the United States and the discovery of gold therein, a numerous immigration was attracted to California, a large portion of which came by sea, and very many settled at the place then called Yerba Buena, but which in a short time acquired the name of San Francisco, by which it has ever since been and still is called, save that the changes occurring therein are the [3] "City of San Francisco" and "the City and County of San Francisco." The population of the place was given in 1850 at 34,000 persons. By the U. S. Census of 1860, it was ascertained at over 56,000, by that of 1870, at over 149,000, by that of 1880, at over 233,000, by that of 1890, at over 298,000, by that of 1900, at over 343,000, and by that of 1910, at 416,912. The present number of inhabitants is estimated by your orator to be over 420,000. The inhabitants of said place were incorporated by the legislature of the State, under the name of the "City of San Francisco," by an Act passed April 15th, 1850; reincorporated with enlarged boundaries by the Legislature aforesaid by an Act passed April 15th, 1851; reincorporated and its name changed to the "City and County of San Francisco" by an Act passed April 19th, 1856 (commonly called the Consolidation Act), with still further enlarged boundaries and with enumerated powers, under which last mentioned Act and the amendments thereto, passed by subsequent legislatures of said State, the affairs of the city continued to be administered and its municipal government carried on down to the 8th day of January, 1900, when a charter for said city

and county, which had been previously adopted by the people and approved by the legislature, went into effect and still, with certain amendments thereto, remains in force. For the provisions of said several enactments and charters and amendments, in detail, so far as the same or any part thereof may be material to the present case, your orator prays leave to refer to the same as enrolled in the archives of the State and printed in the Statute Books of said State.

[4]

Your orator further shows that the portion of the city limits occupied and built on for occupancy, increased with the growth of its population. In 1850 it was almost entirely comprised between Vallejo Street on the north, California Street on the south, the shore of the Bay of San Francisco on the east, and Dupont Street on the west. In 1852 it was surveyed and a topographical map thereof prepared by the officers of the United States Coast Survey showing the lines of the streets so far as then marked on the ground, and the buildings then in existence, a copy of which map on which are also drawn the lines of the city limits as expressed in the Charter of 1850 and 1851 will be offered by your orator as evidence in this action, and is now on file in said court in an action in equity entitled, "Spring Valley Water Works vs. The City and County of San Francisco, a municipal corporation," and others, which said action is numbered 13,395 in the files of said court In 1857 the said city was again surveyed and mapped as aforesaid by the officers of the United States Coast Survey and a copy of the map of the last men-

tioned survey, prepared and published by the United States, showing the lines of the streets so far as then marked on the ground, and the buildings then in existence, to wit, when said last mentioned survey was made, will be offered by your orator as evidence in this action, and the same is now on file in said court in an action in equity numbered 13,395, and entitled, "Spring Valley Water Works vs. The City and County of San Francisco, a municipal corporation," and others; said maps also show, by contour lines, the topography of the site and the elevations above tide level of the various localities in said city embraced within their [5] respective boundaries as delineated thereon.

Your orator further shows that, commensurately with its increase of population, the commerce and commercial importance of said City of San Francisco also increased, and, from the year 1850 on, it has been and remains the commercial center of the whole west coast of the United States, frequented by all the shipping that carries on the commerce between the State of California and other parts of the world; the tonnage of vessels arriving in San Francisco during said period taken at intervals of 10 years was, as your orator is informed and believes, as follows:

In 1850.....	Tons 387,056;	In 1880.....	Tons 827,794;
" 1860.....	" 429,484;	" 1890.....	" 1,080,477;
" 1870.....	" 456,749;	" 1900.....	" 1,487,816;

In 1910.....Tons 5,256,970.

The imports and exports by sea during the same period were, so far as known, as follows (stated at intervals of 10 years, as before):

(1) IMPORTS:

In 1850	Unknown;	In 1880	$37,240,514;
" 1860	$ 8,746,602;	" 1890	45,594,125:
" 1870	19,733,850;	" 1900	39,424,435;
		In 1910	$50,669,435.

(2) EXPORTS, during the same years:

In 1850	Unknown;	In 1880	$35,563,286;
" 1860	$8,532,439;	" 1890	39,969,591;
" 1870	17,848,160;	" 1900	41,419,679;
		In 1910	$65,047,460.

[6]

That the average rate of increase in exports since 1900 shows a ratio of increase quite largely over the average of the previous years mentioned. And the total shipments by sea of merchandise and produce from San Francisco, between January 1st, 1850, and January 1st, 1891, amounted in value to $920,182,391, and that such value has been largely increased since the last named date so that at the present time it amounts to many millions more.

That the value of the real estate within said City and County of San Francisco, as ascertained by the City and County Assessor, and mortgages on real estate therein as returned by the City and County Assessor thereof at intervals of 10 years, from 1859, has been as follows:

Year 1859–60	Real Estate		$ 14,172,235;
1869–70	"	"	69,776,603;
1879–80	"	"	164,939,604;
1889–90	"	"	164,546,348;
1899–00	"	"	190,370,155;
Mortgages			49,836,106;
1909–10	"	"	288,095,453;
Mortgages			40,338,365.

That there existed in its early history and outside and west of the limits of the city as defined by the acts of incorporation of 1850 and 1851 a stream of water flowing to the ocean, capable of supplying about 2,500,000 gallons of water per day, and a private company called "The San Francisco City Water Works" (or more commonly called the "Bensley Company" from the name of its projector) obtained control of this stream and conducted [7] its waters into the city by an aqueduct running along the water front of the Golden Gate, at an elevation of about 20 feet above tide level. This water was pumped into a reservoir 300 feet above tide level, whence it was distributed in pipes underground through the streets of the city on which there were buildings, for the supply of the city and its inhabitants with water, for the extinguishment of fires, and domestic uses, and afforded, from the time its works became available, a sufficient supply at that period, but later the quantity of water supplied and capable of being supplied by the said San Francisco City Water Works, although extremely useful and valuable, was manifestly insufficient for the wants of a city of the importance which San Francisco was evidently destined shortly to attain, and the said company having no other sources of water supply, one George H. Ensign, and others associated with him, who possessed certain water rights deemed available for the purpose, projected the use of them for the supply of the said city; and the legislature of the State of California, on the 23d day of April, 1858, passed an Act entitled, "An Act to authorize George

H. Ensign and his associates to lay down water-pipes in the public streets of San Francisco," whereby it was provided in substance that the said Ensign and his associates, owners of the Spring Valley Water Works, were authorized to introduce water into the City of San Francisco and lay pipes through the streets thereof for its distribution. They were required to lay 3,000 feet of such pipes within a year from the passage of said Act, and the rest as fast as practicable thereafter. [8] The said Act required water to be furnished to the City for the extinguishment of fires gratuitously, and regulated the mode of determining the prices of that furnished to consumers, which were thereby directed to be fixed at sums that would pay the said Ensign and associates, or said Spring Valley Water Works, not less than twenty per cent per annum on their actual capital invested in said works, and that after the lapse of twenty years the City of San Francisco should for 10 years have the right, on giving six months' notice of its intention so to do, to purchase the works at a valuation as therein provided. For the whole text and particulars of the provisions of said Act your orator prays leave to refer to the text thereof as shown in the Archives of the State and as printed in the Statutes of said State.

Under the encouragement of said Act the said Ensign and his associates proceeded to incorporate the Spring Valley Water Works (the grantor and predecessor of your orator) and undertook the supplying of the city and its inhabitants with water. The said company complied with all the terms of said

Statute and acquired the necessary lands, water rights and reservoir sites in, and in close proximity to, the said city, and did add to and increase from that time down to the said grant made by it to your orator herein, and your orator has since said grant to it down to the present, as the city grew in territorial extent, wealth and commercial importance, and in necessary anticipation thereof, added to and increased, under the advice of most capable and competent engineers, their respective means and appliances for supplying [9] water to the said city and its inhabitants and distributing the same by means of pipes laid underground through the streets of the city, keeping in view in all such the continued growth of the city in extent and population, as well prospective as actual, its peculiar geographical position and climatic conditions and the necessity of providing against its wants, in advance of their occurrence, as well as the probable demand at any time for a very large supply of water to meet the contingency of contagious sickness, war or the occurrence of long periods of drought. The Spring Valley Water Works acquired all the property and water rights of the San Francisco City Water Works in 1864. The policy of the said Spring Valley Water Works always was, and the policy of your orator has been and is, to have a storage capacity equalling at least a three years' supply on account of the varying annual quantity of rain, which has been as low as 7.40 inches and as high as 50 inches (the average for the past 51 years or more having been about 25 inches), but the average for the last five years previ-

ous to the winter season of 1902–03 was only 16.64 inches; that of 1902–03 was only 18.18 inches; that of 1903–04 was only 20.36 inches; that of 1904–05 was only 23.76 inches; and for the year 1906–07 to the date of May 9, 1907, was 30.96 inches; and for the year 1907–08 to the date of June 8, 1908, was 18.63 inches; for the year 1908–09 it was 25.57 inches; for the year 1909–10 it was 19.52 inches; for the year 1910–11 it was 25.49 inches; and for the year 1911–12 it was only 13.25 inches; and that your orator's record for the year 1905–06 was destroyed in the conflagration of April 18, 1906, and cannot be stated. [10] The Spring Valley Water Works, before September 14th, 1903, furnished, and your orator since has furnished, water to the following amounts:

In 1865	865	million	gallons;
" 1870	2,204	"	"
" 1875	4,266	"	"
" 1880	4,627	"	"
" 1885	6,223	"	"
" 1890	7,457	"	"
" 1895	7,264	"	"
" 1900	9,295	"	"
" 1901	9,736	"	"
" 1902	10,101	"	"
" 1903	11,532	"	"
" 1904	12,379	"	"
" 1905	12,746	"	"
" 1906	10,657	"	"

(this quantity being somewhat reduced from the previous year by reason of portions of the city not taking water in parts of the area which were covered by

the conflagration of April, 1906).

In 1907	11,181	million	gallons;
" 1908	11,574	"	"
" 1909	12,465	"	"
" 1910	12,995	"	"
" 1911	13,667	"	"

The other principal properties acquired for the purposes aforesaid by the Spring Valley Water Works and by your orator, and now all owned by your orator down to the present time, are briefly as follows, viz.: [11]

The ownership of over 31,870 acres of watershed lands in San Mateo County, on which four fine reservoir sites are situated, viz., the Pilarcitos, the San Andreas, the Crystal Springs, and the Portola or San Francisquito. The acquisition of these lands enables your orator to protect the waters from pollution. The above named reservoirs and the nine distributing reservoirs in the City of San Francisco were constructed from time to time as the growing demands upon the said Spring Valley Water Works and, subsequently, upon your orator since said grant to it, required. The Pilarcitos was built first with a capacity of about one thousand million gallons, at an elevation of 700 feet above tide. Its waters, before the calamity of April, 1906, supplied by gravitation almost the entire Western Addition and the higher portions of the Mission, in the City and County of San Francisco, being stored en route in the Lake Honda distributing reservoir, situated in the hills south of the Park, 365 feet above city base, and having a capacity of 33,000,000 gallons. The water was,

before said date, conveyed from Pilarcitos to Lake Honda in a conduit of three long brick-lined tunnels aggregating one and a half miles, a redwood flume one and a half miles, and an iron pipe, thirty and twenty-four inches in diameter, 14 miles in length.

The San Andreas was built next. It has a capacity of about six thousand million gallons, and is situated 450 feet above tide, and supplies by gravitation the foothill region located west of Valencia, north of Market, as far east as Gough Street, and portions of the Potrero hills. Its water is stored en route in College Hill distributing reservoir, [12] near Holly Park, in the south Mission, San Francisco, 255 feet above city base, and has a storage capacity of fourteen million gallons.

The Crystal Springs was constructed next. It is situated three and one-half miles southwest of San Mateo, at an elevation of 287.85 feet above tide, and has a storage capacity of twenty-two thousand five hundred and twelve million gallons. The upper dam was first built, but later on the concrete dam was constructed. It is to be raised to the 300-foot level as the next stage, when it will have a storage capacity of twenty-nine thousand million gallons, and later on to a higher level, when it will have a storage capacity of between forty thousand and fifty thousand million gallons. The water from Crystal Springs supplies by gravitation the lower parts of the city east of Valencia, north and south of Market, east of Kearny and along the city front to North Beach and the Presidio. Its distributing reservoir in the city is the University Mound located in the southeastern

part of the city, 165 feet above city base. The last named reservoir has a capacity of 35,000,000 gallons and is connected with Crystal Springs reservoir by a 44-inch iron conduit in the neighborhood of 17 miles in length.

The Portola reservoir was built next, on the San Francisquito Creek. Its dam at present is completed to a height of 60 feet; it can be raised 40 feet additionally, that is, to an elevation of 370 feet above tide; it will then have a capacity of three thousand million gallons, and will be connected with the Crystal Springs reservoir by a conduit leading thereto. The said reservoir is not now in use by your orator as a source of supply. [13]

The Spring Valley Water Works and your orator have acquired very valuable properties on Alameda Creek and its tributaries, and at Livermore Valley, near Pleasanton, and in Sunol Valley and Calaveras and San Antonio Valleys (part of which properties are situated in Alameda County and part in Santa Clara County), consisting of many thousand acres of land, water rights, reservoir sites, watersheds and rights of way, and a large natural filtering and storage bed of almost unlimited capacity, and a concrete gallery existing under and into the same,—all of which give it practically the control of the water output from a watershed of more than 621 square miles; all of which properties now belong to your orator. Said Alameda Creek system contains several fine reservoir sites, the most important being the one in Calaveras Valley, which has a capacity of fifty-eight thousand million gallons, or more, and an elevation

of 800 feet above tide; it alone can supply by gravitation fifty million gallons or more, daily, to San Francisco. This system is now furnishing San Francisco with more than sixteen million gallons per day, and will, within thirty days from the date hereof be furnishing it with more than twenty million gallons daily. When the system is fully developed it will be able to furnish an average of more than one hundred and twenty million gallons daily.

That from the present Alameda Creek system the water flows through a 36-inch pipe, connected with tunnels and flumes and conduits, to the westerly shore of the Bay of San Francisco, near Dumbarton Point; from here an intermediate slough and the Bay of San Francisco are crossed by two 16-inch submarine pipes, and two additional submarine [14] pipes 22 inches in diameter, each of the four being about one and one-quarter miles in length. From the westerly ends of the submarine pipes, near Ravenswood, on the west shore of the bay, the water flows through a 36-inch iron pipe to the Belmont pumping station, in San Mateo County, where it is lifted to an elevation of over 240 feet above tide, and therefrom flows in a 36-inch pipe to a place near Burlingame where it connects with a 54-inch pipe through which it flows to Milbrae, where it connects with the before-mentioned Crystal Springs iron pipe line, 44 inches in diameter. The total length of the Alameda pipe line, exclusive of the submarine pipes, is about 28 miles.

The Spring Valley Water Works, first, and thereafter your orator, also acquired the Laguna de la Merced Rancho and adjoining lands, aggregating

over 2,850 acres, on which Lake Merced is situated, having a storage capacity of twenty-five hundred million gallons. That Lake Merced is situate in the City and County of San Francisco, and said Rancho is situate partly in the City and County of San Francisco and partly in the County of San Mateo.

Said lake is connected with the city distributing system by a fine pumping station having a daily capacity of seven million four hundred thousand gallons.

The Spring Valley Water Works first owned, and thereafter and now your orator also owns, certain water rights and lands on Lobos Creek, and a pumping station partially equipped, with a capacity of two million gallons daily. That the waters of Lake Merced form a valuable adjunct to the works of your orator on account of their proximity to the city, and that double their average capacity [15] can be thrown into the city distributing system temporarily in case of any serious break in other parts of the works or in case of any calamity.

Your orator has nine distributing reservoirs in the said city and county, having an aggregate capacity of over 90,000,000 gallons, viz.:

The Clarendon Heights	600	feet	above	city	base
" Laguna Honda	365	"	"	"	"
" Clay Street Hill	375	"	"	"	"
" Lombard Street Hill	306	"	"	"	"
" Potrero Heights	300	"	"	"	"
" College Hill	255	"	"	"	"
" University Mound	165	"	"	"	"
" Francisco Street	135	"	"	"	"
" Presidio Heights	400	"	"	"	"

Your orator has nine pumping stations; they have an aggregate capacity of 68,000,000 gallons daily, or over, and are so located that they supply high portions of the city with water under a first-class pressure up to 600 feet above city base, and are so arranged that the various districts can be supplemented, when necessary, one from the other. The Spring Valley Water Works and your orator have built tunnels of an aggregate length of over 10.63 miles, flumes of an aggregate length of over 17 miles; and the following pipe-lines, viz.: [16]

22.97	miles	of	pipe	44	inches	in	diameter;
28½	"	"	"	36	"	"	"
25.29	"	"	"	30	"	"	"
.88	"	"	"	18	"	"	"
.42	"	"	"	24	"	"	"
3.71	"	"	"	16	"	"	"
4.66	"	"	"	22	"	"	"
3.17	"	"	"	54	"	"	"
.56	"	"	"	37	"	"	"
1.18	"	"	"	23	"	"	"

besides other pipe and pipe-lines used in the distributing system of your orator, and now all owned by your orator; and in addition thereto over 455 miles of distributing pipe laid in the streets of the said city, by which water is supplied under great pressure to consumers for domestic and other uses, and to the government authorities of said city for the extinguishment of fires and for the cleansing of sewers, for which last mentioned purposes and for other municipal purposes your orator and its grantors have, at the request of said city, erected and connected with said distributing pipes in excess of 4387 hydrants in

the streets of said city, which, on being opened, deliver water for the purposes aforesaid under great pressure (greater than that of any others in any of the large cities in the United States), consequent on the elevation of the said distributing reservoirs above the streets, whereon said hydrants are situated. That the total length of pipes used by your orator in supplying the inhabitants of the City and County of San Francisco with water is over 545 miles. [17]

All the said reservoir sites, watersheds, water rights and sources of supply have been purchased by your orator, and its grantors, at prices much less than their present value, respectively, and the said other works have been erected and constructed as skillfully and economically as possible, under the direction of engineers of the highest skill and learning, and without any useless or unnecessary outlay, and have been so purchased, prepared and constructed for the sole purpose of supplying the said City and County of San Francisco and its inhabitants with water as aforesaid. Taken altogether, they constitute a system of water works for a great city absolutely unique in the world, and are not only ample for the needs of the city, with its past and present population, but are capable of extension by the construction of additional dams and aqueducts such as will store and supply sufficient water for the wants of more than two million inhabitants, and this for a small expenditure compared with the fundamental expenditures already made. The value of these properties already acquired for such extensions is not included in the value of the plant in use by your orator as hereinafter set forth. The

properties now in use for the purpose of supplying the City and County of San Francisco and its inhabitants with water are worth in excess of fifty million dollars, while those which will be so utilized in the immediate future are worth many millions more. If the latter had not, by the foresight of your orator and its grantor, been secured in advance of any visible actual necessity therefor, they would have been practically unobtainable not only on account of their largely increased value, but also because they would have been devoted heretofore to other uses such as would have contaminated and unfitted them for domestic water service. [18]

That your orator has caused the actual cost of said water works to the stockholders of its grantor, and to its stockholders, down to the 15th day of June, 1912, to be carefully computed by competent accountants, on the basis of setting down the sums derived by its grantor from sales of its stock and contributions by stockholders of your orator's grantor, at the date of their respective payments, and adding thereto interest thereon at contemporary current rates, down to the next succeeding first of January, and deducting therefrom dividends paid during the year, with interest thereon at the same rate, from the time the same became payable, down to the same date, and carrying forward the difference as a new balance; that, by adding to this sum, so computed, the amount of bonds outstanding, the actual cost of said works to the stockholders of the said grantor of your orator, and to your orator, at the date aforesaid, has been ascertained to be, and your orator avers that the

same has been and is, the sum of $70,574,244.50 at the present time, as follows,—whereof there were derived:

From sales of stock and invested earnings belonging to stockholders of your orator's grantor and interest as aforesaid $49,587,244.50,

And from sales of bonds of your orator and of its grantor..... 20,987,000.00.

Computed at the rates of interest contemplated by the aforesaid Act of April 23d, 1858, such cost would amount to a very much larger sum.

That the said grantor of your orator, for several years after its incorporation, divided none of its earnings among its stockholders, but reinvested the same in the increase [19] and extension of its works, to wit, now included in the works since said September 14th, 1903, and now owned by your orator; and, after it began to make dividends to its stockholders, never made such dividends equal to the contemporary, ordinary, current rates of interest or mortgage investments in San Francisco, nor even to the rate of twenty per cent per annum as contemplated in said Act of April, 1858, and that your orator has never paid dividends on its earnings since September 14, 1903, equal to the contemporary, ordinary or current rates of interest on mortgage investments, in San Francisco, and has not been able to pay, and has not paid, any dividends to its stockholders since January 20, 1906, when a quarterly dividend was paid at a rate for the previous quarter calculated on the basis of five per cent per annum, except as herein alleged:

The said dividends paid by the grantor of your orator have been as follows, and no more, viz.:

1858.....0%	1873.....6%	1888.....6%
1859.....0%	1874.....8%	1889.....3½%
1860.....0%	1875.....9%	1890.....7%
1861.....0%	1876.....9%	1891.....6%
1862.....0%	1877.....9%	1892.....6%
1863 3/5 of 1%	1878.....8½%	1893.....6%
1864.....0%	1879.....8%	1894.....6%
1865.....3½%	1880.....8%	1895.....6%
1866.....5%	1881.....8%	1896.....5½%
1867.....6%	1882.....8%	1897.....6%
1868.....6%	1883..2–2/3%	1898.....5½%
1869.....6%	1884.....4½%	1899.....5½%
[20]		
1870.....6%	1885.....6%	1900.....5–4/100%
1871.....6%	1886.....6%	1901.....3–78/100%
1872.....6%	1887.....6%	1902.....4–2/10%

That the enforcement of the ordinances which the then board of supervisors of the said City and County of San Francisco claimed to have been adopted in February or March or April or May or June of the years 1903, 1904 and 1905 was enjoined pendente lite by the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, and that such injunctions were, by the said court, on November ——, 1911, made permanent and final. That the ordinances which the then Board of Supervisors of the said City and County claimed to have been adopted in February or March or April or May or June of the years 1907, 1908, 1909, 1910 and 1911 are in litigation in this court as to their validity, and the enforcement thereof is enjoined pendente lite; and that the aggregate of dividends paid to stockholders by your orator's grantor, and

by your orator, estimated on the same par value of the issued stock of your orator's grantor, to wit, fourteen million dollars, from moneys collected in 1903, at rates similar to those provided in the ordinance of 1902, was 3.78 per cent, and no more; and in 1904, at rates similar to those provided in said ordinance of 1902, 3.78 per cent, and no more; and under rates similar to those provided in the said ordinance of 1902 was, in 1905, 3.78 per cent, and no more; and in 1906, at rates similar to those provided in said ordinance of 1902, was 1.26 per cent, and no more; and in 1907, at rates similar to those provided in **[21]** said ordinance of 1902, was 0 per cent, and no more; and in 1908, two per cent and no more; and in 1909, 4 per cent and no more; and in 1910, 4 per cent, and no more; and in 1911, 4 per cent, and no more; and in 1912, 2 per cent, and no more, the said 2 per cent being made up of two quarterly dividends upon a basis of 4 per cent for the entire year.

That, under the ordinance, pretended to have been adopted by the then Board of Supervisors of said city and county on March 19, 1906, known as Bill No. 1996, your orator verily believes the dividends which it would have been able to pay to its stockholders for the fiscal year beginning July 1, 1906, and ending June 30, 1907, on a capital the same as the capital of the grantor of your orator, to wit $14,000,000, would not have exceeded, even if it would have been as much as, 3 per cent had not the calamity of earthquake and fire occurred in said city and county in April, 1906; that is to say, three per cent on a capital being only one-half of the par value of the capital

stock of your orator, which capital stock is $28,000,000 (herein at this point no reference being had to the fair value of the property of your orator actually in use by your orator in such supply), and that as a fact during the year 1906 your orator was able to pay and did pay only one dividend, namely on January 20, 1906, which had accrued from its earnings in the year 1905; so that as a fact from the earnings of the year 1906 no dividend was paid that year by your orator to its stockholders, and that not only was no dividend paid to the stockholders during the year 1906, or could be paid from **[22]** its earnings in said year to its stockholders, but your orator was obliged to and did levy an assessment of $3.00 per share on 280,000 shares, namely, the sum of $840,000 to aid it in part in paying its expenses for that year; and that the collections made by your orator during the year 1906 were not sufficient to pay the fixed charges of your orator, said fixed charges being classified as operating expenses, taxes and coupon interest on its bond issues; that is to say, interest as provided in the bonds upon its bonded indebtedness. And your orator alleges that all the money represented by said bonded indebtedness was expended fairly, reasonably and properly in the purchase of properties for the use of your orator in such supply and for the construction of works for the use of your orator in such supply, less the reasonable and usual cost and commissions on bond sales.

The ordinary rates of interest for money lent on first-class mortgages on city property, as shown by the records in the office of the County Recorder of

the City and County of San Francisco, were and are as stated in the table next below for the respective years mentioned, except that in the years 1901 and 1902, 1903, 1904, 1905, and 1906, a very few most desirable and exceptionally favorable loans were made at a rate slightly below six per cent, and except that since the said calamity of April, 1906, the rate of interest has exceeded six per cent, and that at the present time the rate is not, and since the 1st day of January of this year, 1911, the rate of interest has not been, less than six per cent even in favorable instances, and in some cases has run up as high as eight or nine per cent. **[23]** That the rates of interest that prevailed in San Francisco from 1858 to 1912, both inclusive, were substantially as follows:

1858....24%	per annum;	1884....7%	per annum;
1859....24%	" "	1885....7%	" "
1860....21%	" "	1886....7%	" "
1861....18%	" "	1887....7%	" "
1862....18%	" "	1888....8%	" "
1863....18%	" "	1889....7%	" "
1864....15%	" "	1890....7%	" "
1865....15%	" "	1891....7%	" "
1866....12%	" "	1892....7%	" "
1867....12%	" "	1893....7%	" "
1868....12%	" "	1894....7%	" "
1869....12%	" "	1895....7%	" "
1870....10%	" "	1896....7%	" "
1871....12%	" "	1897....7%	" "
1872....10%	" "	1898....7%	" "
1873.... 9%	" "	1899....6%	" "
1874.... 9%	" "	1900....6%	" "
1875.... 9%	" "	1901....6%	" "
1876.... 9%	" "	1902....6%	" "

1877....	9%	per annum;		1903....	6%	per annum;	
1878....	9%	"	"	1904....	6%	"	"
1879....	9%	"	"	1905....	6%	"	"
1880....	8%	"	"	1906....	6%	"	"
1881....	8%	"	"	1907....	7%	"	"
1882....	7%	"	"	1908....	7%	"	"
1883....	7%	"	"	1909....	6½%	"	"
				1910....	6½%	"	"
				1911....	6½%	"	"
				1912....	6½%	"	"

[24]

And your orator alleges that the City and County of San Francisco claims to have acquired by purchase a property known as the County Line Water Plant and Property, formerly owned by the County Line Water Company which was at one time used to supply an exceedingly small district in the City and County of San Francisco; that the water produced by said plant is pumped from wells; that there cannot be furnished or supplied therefrom one million gallons of water per day, and the water which is derived from said wells is of very inferior quality. That except for the alleged acquisition of said County Line Water Plant and Property and the construction of salt water systems and a system of pipes for fire protection, the City and County of San Francisco has not, nor have any of the public authorities thereof, ever acquired any property which is now used or ever has been used in supplying the City and County of San Francisco, or any of its inhabitants, with water, or for protection against fire or for any other purpose, but on the contrary, the water supply of said city has been left entirely to private enter-

prise, and ever since the passage of said Act of April 23d, 1858, and the purchase by your orator's grantor of the works of the said San Francisco City Water Works, such supply has been (with some very trivial exceptions of water supplied by wells, within the city limits, and a small amount furnished by the Visitacion Water Company and the County Line Water Company for a limited period) effected by the works formerly owned by the Spring Valley Water Works and now owned by your orator, which works for more than forty consecutive years have supplied the city and the city and county and their respective innabitants and have furnished them an abundant quantity of pure fresh water and **[25]** a better quality of water than obtains in any other large city in the United States, for the use of the inhabitants and of the municipality and the shipping frequenting this port (saving a short space of time when the earthquake of April, 1906, temporarily and partially interfered with the operation of your orator's plant for a few weeks and less than one month). So abundant and well-distributed is the supply of water secured by the said works of your orator for the purposes that the grantor of your orator did not, and your orator itself has not had even to request any economy in the ordinary and regular use of water in said city, and then only in case of what appeared to be willful waste. Your orator will enter upon the year commencing July 1, 1912, with a supply of over twenty-four thousand million gallons on hand in its reservoirs, as it had on hand on the first day of June of this year in its reservoirs over twenty-four thousand

million gallons. It also has an inflow or supply, at the present time, of sixteen million gallons per day additional thereto from its Alameda Creek system, which said supply will, within the next thirty days from the date hereof, be increased to twenty million gallons per day by means of the construction of a new pumping plant now being installed by your orator at Ravenswood.

That under the laws in force prior to the adoption of the said Constitution, which is generally known as the New Constitution, the grantor of your orator was required to supply the said city and county with water for the extinguishment of fire gratuitously, and the rates to be charged for the supply to consumers and for other purposes were to be determined by a board of five Commissioners, two to be selected by the city, two by the company, **[26]** these four to select the fifth person, and in case they could not agree the Sheriff was to appoint the fifth Commissioner. After said Constitution was adopted and after it went into effect these provisions were changed, and the Board of Supervisors of the city and county was by the provisions of said Constitution authorized and directed to fix water rates, and the city was required to pay for water supplied to it for extinguishing fires; and thereafter conferences were had between the officers of the grantor of your orator and the proper committee of the Board of Supervisors as to the proper mode of charging the city and county for water supplied to it through hydrants for the extinguishment of fires and the cleansing of sewers, wherein, after much discussion

and as a compromise of divergent opinions, it was agreed that, as it was impossible to determine the quantity of water used or even likely to be used by the city for such purposes, the proper method of charging and paying therefor was to establish a sum to be paid monthly for each hydrant so that the total amount paid might bear some proportion to the service rendered.

For the fiscal year 1882, 1883 the then Board of Supervisors by ordinance established two dollars and a half per month for each hydrant, as the sum to be paid by the said city and county for the said service, and that the rate was similarly continued until the year 1895, when the Supervisors increased the rate to the sum of five dollars per month for each hydrant, as a just and proper sum to be [27] paid therefor by the city, and then at once and ever since correspondingly decreased rates for domestic uses of water; and thereupon, for that and all succeeding years thereafter, and down to the adoption of the Charter in 1900, that sum was adopted in each consecutive year as the rate to be paid by the said city and county for the aforesaid service.

That the rate so established and in force for the years preceding the adoption of said Charter of January, 1900, was such as to enable the grantor of your orator to pay its current expenses, interest and taxes, and make to its stockholders the dividends above shown on its issued capital stock, but such rates did not make any allowance or provision for depreciation nor for obsolescence (hereinafter defined), nor for replacement of any of the plant destroyed by ex-

traordinary casualty. That in fixing such rates said Supervisors adopted the policy of throwing almost the whole cost and expense of water supply for the city and its inhabitants on the private consumers of water, and on the city and county, for water supplied to it through hydrants, a very small proportion thereof; in pursuance of which policy the rate for water supplied to hydrants was, as hereinabove mentioned, fixed by said Board of Supervisors at $5.00 per month for each hydrant, a sum far less than the value and benefit of the service rendered. And the said Board of Supervisors first elected under the said Charter of January, 1900, did, after hearing testimony and after full consideration of the subject, unanimously adopt the policy and acts of the preceding Board, and determined that the said sum of five dollars per month for each hydrant was a just [28] and proper sum to be allowed for water so supplied, and in the month of February, 1900, passed an ordinance establishing water rates for the year commencing July 1st, 1900, wherein the rate to be paid by the city and county for water supplied to hydrants was established at the sum of five dollars per month for each hydrant, under which ordinance the grantor of your orator was able to pay its operating expenses, interest and taxes, and to divide among its stockholders 4.62 per cent on its capital stock, and no more, but was not able to make any provision for depreciation or obsolescence nor to provide a fund to replace capital expenditures destroyed by extraordinary casualties.

That in the month of February, 1901, however, the

then Board of Supervisors, consisting of the same individuals who had acted as such in the year 1900, except Supervisors Braunhart, Wilson and Stafford, in pursuance of the suggestion, and being advised by their Water Committee that such a measure would be popular, and hoping thereby to gain popularity and a re-election to office, and with the purpose of depreciating the market value of the properties of the grantor of your orator so that the city and county, if it should so elect, could acquire the same at a greatly reduced price, proceeded without any other or further evidence than they had before them in a like proceeding in the preceding year, and without the knowledge, or even the suggestion of any additional fact in connection with the subject, in and by their said ordinance of February, 1901, to and did reduce the charge or compensation to be paid by the said City and County of San Francisco, for water supplied to it for the extinguishment of fires, cleansing of sewers, etc., [29] through hydrants, from the said rate of $5.00 per month for each hydrant, which would amount to $225,300 and which they had themselves, but a year previously, determined to be a just rate therefor, to a lump sum of $80,000 per annum for water supplied through all the hydrants in the city and county. That the number of such hydrants attached to and connected with and supplied with water by the said distributing pipes of the grantor of your orator then was 3,755, besides which there were others (the number of which is unknown to your orator) attached to and supplied by the distributing pipes of the Visitacion Water Company, a corporation.

That in February, 1902, the said Board of Supervisors fixed the said hydrant rate at the sum of $2.00 per month for each hydrant, and that the number of hydrants connected with the distributing system now owned by your orator, and now in use, is 4,387.

That in March, 1903, the then Board of Supervisors of said city and county claimed to fix hydrant rates for the next ensuing fiscal year at $2.00 per hydrant; that in March, 1904, the said Board of Supervisors, without any deterioration in the value of hydrant service and without any deterioration in the value of the use of water for fire purposes or in the value of your orator's property or in the service rendered and to be rendered in that behalf by your orator, but for the purposes and reasons above expressed, and to save municipal money for other purposes and uses, willfully, arbitrarily, unjustly and without cause claimed [30] to reduce said hydrant rate to $1.00 per month per hydrant, and have, for the same purposes and reasons fixed the same rate ever since, until the adoption of an ordinance to take effect July 1, 1908, in which said hydrant rate was fixed at $2.50 per hydrant per month, and in the ordinance to take effect July 1, 1909, the hydrant rate was fixed at $2.50 per hydrant per month, and in the ordinance to take effect July 1, 1910, the hydrant rate was fixed at $2.50 per hydrant per month, and in the ordinance to take effect July 1, 1912, the hydrant rate was fixed at $2.50 per hydrant, per month.

That the said City and County of San Francisco is, and has been during all the times hereinafter mentioned, and still continues to be, a consumer of water

furnished by your orator, and is a rate payer of your orator and derives nearly all of its supply of water from pipes connected with the mains of your orator herein, and extending into the houses, buildings, hydrants and parks owned or occupied or used by said city and county, and that during all the times since the said acquisition of said works by your orator, said city and county is and has been a customer of your orator and supplied by your orator with water for domestic uses, as well as for said other purposes.

V.

That the purposes of the incorporation of your orator were and are, among other things, to supply said city and county and its inhabitants with pure fresh water; that your orator has a franchise for that purpose, although it is not, and never has been, an exclusive franchise and [31] does not constitute and never has constituted a monopoly of the right to furnish water to said city and county and its inhabitants. That for many years last past the grantor of your orator and your orator have been and are now supplying the larger portion, or nearly all, of the fresh water consumed by said city and county and its inhabitants, and that there are no water works in said city and county except those owned by your orator, capable of supplying all the water required by said city and county and its inhabitants, and that there are not, and were not at any of said times in this bill mentioned, any municipal or public water works in said city and county or belonging to said city and county, or operated by said city and county, except said County Line Water Property which is claimed to be

owned by said city and county. That the said business of your orator is an established and going business; that it will take at least six years for the establishment of a rival plant, that distributing pipes are connected with its mains to nearly all the houses, places of business and buildings, public and private, in said city, and have been for years, and that its customers in said city and county number many thousands; that the value of its plant is increased by reason of such established and going business by at least $7,000,000, and that such value is distinct and separate from, and is over and above the actual physical value of said plant for the reasons last aforesaid. [32]

VI.

That in order to carry out the said purposes of their respective incorporations, the grantor of your orator and your orator have since their respective incorporations acquired reservoir sites, buildings and reservoirs, and obtained riparian and other rights and properties necessary to secure the absolute ownership of water caught and impounded in their reservoirs, and have purchased water rights and have bought large tracts of land for the purpose of obtaining an adequate supply of pure fresh water and of preserving the same in good and potable condition, and have constructed aqueducts and pumping plants and other works, and have laid many miles of large water pipes for conveying the water to said city and county and distributing the same to said consumers, and have purchased and acquired and own other properties necessary and essential in the conduct of their

business and the purposes of their respective incorporations, and that all said properties and rights above referred to have been and are now actually used and are necessary and essential in supplying said city and county and its inhabitants with pure, fresh water, and are now, and ever since said date of September 14th, 1903, have been, owned by your orator, and that the aforesaid rights, lands, works, pipes, improvements and properties are and were at all the times in this bill of complaint hereinafter mentioned, of great value, to wit, of a value very largely in excess of $50,000,000. [33]

VII.

And your orator further alleges that in order to procure funds required in acquiring water rights and other properties necessary in the conduct of said business, and in constructing its works and in making the improvements necessary and essential for the purposes of their respective incorporations, the grantor of your orator and your orator have, during the last forty years, been compelled to borrow, and have borrowed, in addition to funds furnished by the stockholders of your orator's grantor and of your orator in renewing its indebtedness large sums of money, amounting in the aggregate to more than $19,140,000, and that your orator has now an aggregate outstanding interest-bearing indebtedness, secured by mortgage on its property, of $20,987,000, made by it and by its grantor, and assumed by it, and that the interest upon said mortgage indebtedness and other indebtedness which will accrue and will be necessary to be paid during the fiscal year ending June

30, 1913, will amount in the aggregate to not less than $760,000.

VIII.

And your orator alleges upon its best information and belief that, during the said fiscal year ending June 30, 1913, the operating expenses of your orator, which will actually and necessarily be incurred in operating its works in actual use for the purpose of its said business, and in carrying on its said business, will amount to $874,913, or more, exclusive of and in addition to depreciation, obsolescence, and a proper allowance for replacement of portions of the plant liable to be destroyed by extraordinary casualty. [34]

IX.

And your orator alleges, upon and according to its best information and belief, that during the said fiscal year ending June 30, 1913, and before the expiration thereof, it will be compelled to pay the sum of Four Hundred and Fifty Thousand Five Hundred and Sixty (450,560) Dollars, or more, as state and city and county and county and school and federal taxes levied upon its property for that year, and that it will be compelled to pay the sum of Four Hundred and Thirty-five Thousand and Forty-one (435,041) Dollars, or more, as state and city and county and county and school and federal taxes levied upon its properties used and useful in supplying the City and County of San Francisco and the inhabitants thereof with water.

X.

That the amount of the issued capital stock of your

orator is, and was at all the times hereinafter stated, $28,000,000, divided into 280,000 shares of the par value of $100 each, and is owned and held by approximately 1300 shareholders.

That since the calamity caused by the fire and earthquake of 1906, the stockholders of your orator have paid to it for use in the operation of its plant, and repair of the same occasioned by said earthquake and fire, the sum of $3.00 per share, or a total of $840,000, on its capitalization of $28,000,000, represented by 280,000 shares; that the stockholders of your orator's grantor furnished for the purchase and construction of the works now included in the works owned by your orator, and so actually in use in supplying water, a sum largely in excess of the par value of all the 140,000 shares of your orator's grantor, and that the cost of said properties and works of your orator, so actually in use, largely exceeds the aggregate sum or par value of said stock of your orator's grantor, to wit, $14,000,000, and all [35] said outstanding bonded indebtedness and, as a fact, the value of the properties and works owned by your orator exceeds the aggregate sum of the par value of your orator's stock and all said outstanding bonded indebtedness. That the usual rate of annual interest or income to be allowed in San Francisco for permanent investments in dividend-paying stock of the character of the stock of your orator is not less than six to seven per cent upon the value thereof, even if calculated at the said sum of $14,000,000, and that the holders of the stock of your orator are justly and reasonably entitled to receive dividends upon their said stock at

not less than six to seven per cent per annum upon said last named sum, though the value of the property is much greater, as above stated, than said last named sum, and that seven per cent per annum upon the value of its property is a fair remuneration in the premises, plus operating expenses, taxes and a proper allowance for depreciation and obsolescence, and a proper allowance for the replacement of portions of its plant liable to be destroyed by extraordinary casualties, and that your orator is fairly entitled to have and receive, as rates for water supplied by it to said City and County of San Francisco, and its inhabitants, an income which will realize at least seven per cent upon the actual value of the actual property in use in furnishing and supplying said water, and, in addition thereto, its actual operating expenses and the amount of taxes levied for state and city and county and county and other purposes, and an annual sum or per cent for depreciation of its plant in the premises and [36] for obsolescence and to replace portions of its plant liable to be destroyed by extraordinary casualties, and that the value of its franchise and the value of its established and going business are, and should be, a part of such actual value and should be added to the value of said properties.

XI.

That among the properties comprised in the plant of your orator, used and necessary to be used in supplying the City and County of San Francisco and its inhabitants with water, are machinery, flumes, chutes, gates, buildings, pipes, trestles, screens, fences and tanks of the value of more than eighteen million dol-

lars. That these portions of the plant are subject to depreciation. That it is common practice in all well-managed companies, to make an annual allowance for insurance against destruction by fire or other casualty, for depreciation, ageing and wearing out and obsolescence of plant, and to provide a fund for replacing such property when destroyed or worn out, or when it has become obsolete, for there is continually in progress in all such plants a waste and depreciation, which is due to its use, the ravages of time, and the action of the elements. A portion of this wear and decay can be offset by ordinary repairs. All of the property which thus wears out or decays must be replaced sooner or later, if the integrity of the plant is to be maintained, and the cost of replacing the portions of the plant so decayed or worn out by use enter into the cost of furnishing, supplying and delivering water. To maintain a plant for the furnishing of water, and to maintain the plant of your orator, it is necessary [37] to provide for two items, namely: (1) Ordinary annual repairs; and, (2) replacement of worn-out or obsolete portions of the plant. The necessity of making an annual allowance to cover depreciation and obsolescence arises from the fact that the second item of maintenance above mentioned, namely, replacement of worn-out or obsolete portions of the plant, must be made periodically rather than annually, although the actual wearing out resulting from use is constantly progressing. The replacing of worn-out and obsolete portions of the plant, as necessity arises therefor, is as essential to the maintenance of the plant in its integrity as is

the making of current repairs. The practice of making an annual allowance for depreciation and obsolescence has become so well established, and is so clearly necessary and right, that the public service commissioners of many states, in the instructions which they have issued in relation to the keeping of accounts and making reports by public service corporations, expressly provide for a separate statement of such items, and the term "obsolescence" is now generally accepted by accountants as the proper term to indicate the loss resulting from discarding plant and machinery before it is worn out, and the substitution therefor of improved plant and machinery, by means of which water can be more economically furnished and supplied. That the life of said portions of your orator's plant hereinbefore referred to is limited, and that the amount of the annual depreciation of such portions exclusive of and in addition to ordinary annual repairs, is more than $260,000, which sum is a cost and expense incurred by your orator annually in supplying water to the City and [38] County of San Francisco and its inhabitants, and will be incurred and suffered by your orator during the fiscal year beginning July 1, 1912, in supplying water to said City and County of San Francisco, and its inhabitants. That such annual depreciation does not affect the ability of your orator to render the service needed by the City and County of San Francisco, and its inhabitants, but, as hereinbefore alleged, constitutes an annual expense of your orator in rendering such service.

That, in addition to such annual depreciation, your

orator is entitled to an allowance for obsolescence to enable it to replace portions of its machinery, and apparatus, for which new machinery and apparatus should, from time to time, be substituted in the interest of economical administration and operation. That the pumping and other machinery and apparatus used by your orator in supplying, furnishing and distributing water are of such a character that they become obsolete and have to be entirely replaced by newer and more efficient machinery and apparatus, as the result of new discoveries, inventions and improvements in the business of supplying, furnishing and distributing water, and in the interest of, and in order to effect, economical administration and operation.

That your orator is also entitled to an allowance to cover extraordinary casualties and contingencies, such as the earthquake of April, 1906, and losses by fire. That for the public to deprive your orator of all opportunity to anticipate or recoup losses occasioned by fire, earthquake or other casualties, by prescribing rates containing no allowance from which such losses can be paid, necessarily is to deprive your orator of its property and of its liberty [39] to make contracts concerning its property without due process of law, and to deny to your orator the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States, for all persons, except those for whom rates are prescribed by law, are permitted, if opportunity be afforded, to anticipate and recoup such losses at will and without restraint of law.

That to cover, provide and compensate your orator for obsolescence and losses liable to be caused by extraordinary casualties, it is entitled to an allowance, in the rates adopted by the Board of Supervisors, of at least forty thousand dollars per year. That of this sum twenty thousand dollars should go to the credit of obsolescence, and twenty thousand dollars to the credit of an account to provide for losses occasioned by earthquake, fire and extraordinary casualties. And your orator alleges that a reasonable amount to provide for obsolescence is the sum of twenty thousand dollars per annum, and that the amount necessary to provide annually for losses by earthquake, fire and extraordinary casualties is twenty thousand dollars, and that said amount is reasonable.

That the total cost of pumping and other machinery, subject to obsolescence and included in the plant of your orator, is more than fifteen hundred thousand dollars.

That in adopting said ordinance, copy of which is marked Exhibit "A," and in establishing the rates therein, defendants failed to consider, or make any allowance for, depreciation, or for obsolescence, or for extraordinary casualties or contingencies, and that, in fixing the said [40] rates, defendants refused to allow any amount or sum for depreciation or for obsolescence or for extraordinary casualties or contingencies, and that said defendants did not, in determining the rates set forth in said ordinance, allow, nor did they make any allowance for, the depreciation of any portion of your orator's plant for

the fiscal year beginning July 1st, 1912, the sum of $260,000, or any other sum whatsoever, and did not allow any sum or amount whatever for obsolescence, or for extraordinary or other casualties or contingencies.

XII.

That, on the 18th day of April, 1906, an earthquake occurred, which destroyed portions of the property owned by your orator, used in, and which were necessary for use in, supplying the City and County of San Francisco and its inhabitants with water. That said earthquake was of unusual severity, and caused the destruction of much other property in, and in the vicinity of, San Francisco. That said earthquake was an extraordinary casualty, and one which could not have been anticipated, and was not anticipated, by your orator nor by any other property owner in the district or territory affected by said earthquake.

That said earthquake was followed by a conflagration which lasted for several days and destroyed all the buildings and structures in a large section of the city and county. Said earthquake and fire are frequently referred to as the calamity of April, 1906, and are so referred to herein.

That your orator replaced portions of said plant destroyed by said earthquake, all of which replacements were necessary in order to enable it to supply to the City [41] and County of San Francisco and its inhabitants, the water required by them, and ever since said replacements were made they have actually been used, and are now being used, and are neces-

sary to be used, and will in the future be necessary, in supplying to said city and county, and its inhabitants, the water they require. That said replacements cost Six Hundred and Eleven Thousand Three Hundred and Thirty-six and 31/100 (611,336.31) Dollars, all of which has been paid by your orator. That in adopting said ordinance herein referred to, copy of which is marked Exhibit "A," and in establishing the rates specified therein, defendants refused to consider or to give any credit for, or weight to, the cost of said replacements, or to give your orator any consideration whatsoever therefor, and expressly determined that your orator was not entitled to have said replacements, or the cost thereof, considered in determining the rates to be collected for water furnished during the fiscal year beginning July 1st, 1912. That the rates allowed by the Board of Supervisors of said city and county in the ordinances passed from the year 1903 to the year 1911 have not been sufficient to provide, and that your orator has not collected or received, even the lowest current rates of interest on the value of the property of your orator used, and necessary to be used, in supplying to the City and County of San Francisco, and its inhabitants, the water required by them, and that said rates have not been, nor has your orator received, a sufficient amount to reimburse it for the expenses incurred in making necessary or any replacements. That the moneys to pay the cost of such replacements, made necessary by the damage caused by said earthquake, were obtained by your orator through and by [42] means of an assessment of three dol-

lars per share levied upon its capital stock and paid by its stockholders.

XIII.

That the rates collected by your orator since the first day of April, 1906, have not been sufficient to enable it to pay any dividends to its stockholders, except as herein alleged and none have been paid since that date, except as herein alleged, but, on the contrary, your orator has levied an assessment of three dollars per share upon its capital stock, amounting in the aggregate to eight hundred and forty thousand dollars, all of which was paid by its stockholders. That said eight hundred and forty thousand dollars was used to pay the cost of replacing portions of its plant and property destroyed by earthquake, as hereinbefore alleged, and to pay interest on its bonds and its current expenses.

That the rates fixed by the ordinance passed by the Board of Supervisors of the City and County of San Francisco during the year 1907, and to take effect on the first day of July of that year, would not have returned or yielded to your orator an income equal to two per cent on the value of its property used in supplying said city and county and its inhabitants with water over and above its operating expenses and taxes, leaving entirely out of consideration any charge for replacing any portion of its plant destroyed by extraordinary casualties.

XIV.

That your orator is entitled, under the provisions of the Constitution of the United States to have rates for supplying fresh water to said city and county, and its inhabitants, so fixed that it may receive from

and under such [43] rates a reasonable and just compensation and fair remuneration for the services rendered, and based upon the actual value of the actual property in use by it in rendering such services and in supplying such water; and that if so fixed the aggregate annual income of your orator from such rates, with said operating expenses and taxes, and an allowance for depreciation and obsolescence and to replace portions of its plant destroyed by extraordinary casualties, should amount for said fiscal year ending June 30, 1912, to more than the sum of $3,210,000. That after said calamity of April, 1906, the average consumption of water was for a time in the neighborhood of twenty-nine million gallons per day; that before said calamity the average consumption was from thirty-two million to thirty-three million gallons per day, and now is over thirty-seven million gallons per day.

XV.

That ever since its incorporation to the present time your orator has complied with the Constitution of the State of California and all the laws of the State of California in all the premises respecting the matters hereinbefore and hereinafter set forth, and in the performance of its duty in furnishing pure fresh water to said city and county, and its inhabitants, and that, ever since its incorporation and down to the time of the acquisition of said works by your orator, the grantor of your orator did likewise.

XVI.

That it is provided in and by the fifth amendment to the Constitution of the United States that no per-

son [44] shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation, and that by the fourteenth amendment to the Constitution of the United States it is further provided that "no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law"; and your orator alleges that this action is a case in equity arising, and that it arises, under the Constitution of the United States, and that the judicial power of the Honorable Court, above-entitled, extends to and embraces this action and its issues, as your orator is informed and believes, and that the issues herein and in this action set forth involve federal questions under said Constitution of the United States and, by reason of the acts and facts and things hereinafter and hereinbefore alleged, the rates hereinafter referred to are unreasonable, unjust, fraudulent, confiscatory, ambiguous, uncertain and unintelligible and if enforced will compel your orator to conduct its said business and operations without fair remuneration, and as to certain portions of said business and operations and supply of water without any remuneration or compensation; and that said rates and said ordinance are violative of, and prohibited by, each and all of the said provisions of said Constitution of the United States, and by reason of and under said provisions are void and null; and that under said

ordinance your orator would, and will, be compelled to furnish water to said city and county and [45] its inhabitants at less than the fair, reasonable and just value of the service rendered, and that by the enforcement of said rates and said ordinance your orator would be and will be deprived of property without due process of law, and will be deprived of property without any process of law, in violation of the provisions of the Constitution of the United States; and that by such enforcement its property would be and will be taken for public use without just compensation and, in some instances, without any compensation, and that by such enforcement the privileges and immunities of your orator would be and will be abridged and the equal protection of the law denied to it, in violation of the provisions of the Constitution of the United States. And your orator further alleges that the matter in dispute in this action exceeds, exclusive of interest and costs, the sum or value of $5,000.

XVII.

That in and by the Constitution of the State of California, it is specifically and in direct terms, among other things, provided and enjoined that rates for supplying water, or compensation, shall be fixed in the following (and that they can be fixed in no other) manner, to wit: "Annually by the Board of Supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body." And your

orator alleges that the said Board of Supervisors did, on the 24th day of June, 1912, pass a certain bill or ordinance, fixing the maximum rates to be charged; for furnishing water to the [46] City and County of San Francisco for the fiscal year commencing July 1, 1912, and that a true and full copy of said bill or ordinance is annexed to this bill of complaint, made a part hereof as though incorporated herein at length, and marked Exhibit "A," and that defendants threaten to and will enforce said ordinance for said fiscal year against your orator unless restrained by your Honors and said Court, and will thereby deprive your orator of its property without due process of law, and will take your orator's private property for public use without just compensation, and in some instances without any compensation, and will enforce said law or ordinance, and will thereby abridge the privileges and immunities of your orator and deny to, and deprive it of, the equal protection of the law, in violation of the provisions of the Constitution of the United States.

XVIII.

That said bill or ordinance, Exhibit "A," fixes the rates to be charged for supplying water to the said city and county and its inhabitants for said fiscal year 1912–1913, but that the same was adopted without due process of law and not according to the provisions of law and in a manner that deprived and deprives your orator of the equal protection of the laws for the reasons hereinbefore and hereinafter stated, and that the rates thereby fixed are wholly illegal and unconstitutional under the said provi-

sions of the Constitution of the United States, and are unauthorized, and if enforced will result in depriving your orator of its property without due process of law.

And your orator alleges that it has acquired, at the cost of many hundreds of thousands dollars, and owns lands, water rights and properties for the reasonable use [47] of your orator in supplying said City and County of San Francisco, and its inhabitants, with water to anticipate such reasonable immediate demand. That such properties are reasonably worth many millions of dollars, and soon will be necessary in such supply, or, at least, progressively so, part by part, but that defendants have arbitrarily and absolutely refused to take such value, or any part thereof, into consideration in any way in fixing the value of your orator's plant or to make any allowance whatever therefor in fixing such value—unjustly and inequitably claiming that your orator should be allowed only for property actually and physically then in use, and not for property acquired for reasonably immediate use, though obtained by actual expenditure presently incurred. That said refusal is unreasonable, unjust and inequitable; that said properties have been acquired in good faith and, as aforesaid, will soon be necessary and prudent for use in such supply, or, at least, part by part; that they have been acquired to meet the demands for such supply and not at an unreasonable time in advance of such demands; that they were acquired when they could be acquired prudently and without delays which, by reason of possible necessity of condemnation pro-

ceedings, might have been extended beyond the times when such demands would be imperative and impossible of fulfillment. That if said defendant, the City and County of San Francisco, were operating its own municipal water works and supply, it would, of necessity, be compelled to acquire properties therefor in advance of use, and to pay interests on the moneys utilized therefor, long before such properties [48] were in actual use and during construction, as well as during acquisition, and that such interest would be paid necessarily from general taxation as the laws of the State of California now exist, and all consumers of water, according as they respectively own assessable property, would be contributing thereto. That it is inequitable to apply to your orator an arbitrary rule in the premises, as has so been done, and compel it to carry said properties at a loss until the actual physical use thereof shall begin and thus treat your orator in a manner different from that with which a municipality engaged in a similar service would be treated. That said properties so acquired are worth many millions of dollars. That the rates fixed by the said bill or ordinance were fixed arbitrarily and at random and by mere guesswork, and were not based upon actual values of the properties, but upon the mere whim of the said Board of Supervisors, defendants herein, and that said Board never did determine or pretend to determine the value of the property of your orator then actually in use or to be used in supplying water for said fiscal year; and that various members of said Board of Supervisors, at the very meeting at which the said

ordinance was to be passed, so stated. That said rates were fixed by the said Board without any consideration of, or regard to, the rights of your orator, or to the reasonable income and revenue to which your orator is entitled, based upon the value of the works actually used by your orator in supplying water to said city and county and its inhabitants, or to a reasonable income or revenue based upon the actual value of the actual property then [49] in use, or used and owned, by your orator in supplying water to said city and county and its inhabitants, and without regard to the amount of said interest-bearing indebtedness or bonds of your orator assumed and owned by your orator or issued by it, or the annual interest thereon, or the actual operating expenses of your orator, or the actual amount of taxes which it will be required to pay, or the right of your orator's stockholders to a reasonable or any dividend upon their said stock, and without any allowance for depreciation of your orator's plant, or for obsolescence, and without any allowance to provide for the replacement of portions of the plant of your orator destroyed by extraordinary casualties, but in total disregard thereof, and without reference to the value of the services in the premises to be rendered by your orator, or any other person or corporation, and without taking into account at all the value of the franchise, or the going and established business, of your orator.

And your orator alleges that said bill or ordinance, and all proceedings of said Board at said meeting on June 24, 1912, in reference thereto, and all of the

meetings of said Board in reference thereto, were and are contrary to and violative of said provisions of the Constitution of the United States and void thereunder, and that therefore said ordinance will, if enforced, deprive your orator of its property without due process of law, and abridge the privileges and immunities of your orator, and deny to it the equal protection of the laws. **[50]**

That a report showing the value placed by the Circuit Court of the United States upon the properties of complainant as of the year 1903, the price paid by complainant for properties acquired since 1903, which are at the present time used and useful in supplying the City and County of San Francisco, and its inhabitants, with water, and the amount which the City Engineer asserts represents the depreciation of all properties of complainant since the fiscal year 1903–04, to June, 1912, but explicitly stating no appreciation in the value of your orator's property was considered,—was filed with the said Board of Supervisors by Marsden Manson, City Engineer of the City and County of San Francisco, on June 7, 1912, but that said Board has failed to allow a reasonable return upon even the value so reached by said Manson.

That said Board of Supervisors refused to consider one important element of value of your orator's property, to wit, its established business. That said element is of the value of more than seven and one-half million dollars, and your orator was entitled to have said element taken and treated and considered as of that value by said Board of Supervisors in fix-

ing and establishing rates for said fiscal year. That in a report made by C. E. Grunsky, City Engineer, in 1903, in which said Grunsky fixed a valuation upon the property of your orator, he valued its established business at one million four hundred thousand dollars, and the remainder of its property used in supplying the City and County of San Francisco and its inhabitants with water at twenty-four million one hundred and twenty-four thousand three hundred and eighty-nine dollars, but that the said Board of Supervisors, in fixing and establishing [51] said rates set forth in Exhibit "A," did not allow, but refused to allow, to your orator any value at all for such established business.

XIX.

That said bill or ordinance is, and the rates purported to be fixed thereby are, wholly void, null, unjust, unreasonable, fraudulent and unconstitutional under the said provisions of the Constitution of the United States, and oppressive and confiscatory and ambiguous, uncertain and unintelligible and that the said rates do not permit of, or provide for, a just or fair or reasonable compensation for water to be supplied during said year by your orator, or any other person, to said City and County and its inhabitants, and that if said bill or ordinance is enforced your orator's gross income for said fiscal year, after deducting operating expenses and taxes, a proper charge for depreciation and obsolescence, and a proper charge for replacement of portions of your orator's plant which may be destroyed by extraordinary casualty, will be insufficient to pay any dividend what-

ever during said fiscal year to the stockholders of your orator in excess of two per cent upon the value of the property of your orator necessary to be used in supplying water to said City and County and its inhabitants.

XX.

That said rates are unreasonable, unjust, unfair, confiscatory, arbitrary, unintelligible, uncertain and ambiguous. That a reasonable return to your orator in the premises is seven per cent per annum on the value of the property actually in use, plus operating expenses, taxes, and a fair allowance for depreciation and obsolescence, [52] and a fair allowance to provide for replacement of portions of its plant which may be destroyed by extraordinary casualty, and that said rates last mentioned are unwarranted, unjust, unfair, oppressive and illegal and deprive your orator of property without due process of law; that said board in said determination of said rates assumed that your orator's business would, by increase of consumption of water, be larger than in the prior fiscal year without regard to the value of its properties in use or the value of the extra service to be rendered. That defendants intended by such rates to, and will, if such rates are enforced, wholly deprive your orator of the value and the income of such increase in business, if any, without taking into account the extra service to produce the same, or, if none, then by such assumed increased amount of income from such increased business reduce the present income of your orator. That said board could not determine and did not determine that there could be or

would be any increase in income from new business during said coming fiscal year 1912–1913 and could not rightfully, for the reasons aforesaid, or for any reasons, make any deduction for that purpose; that an ordinance establishing rates in the manner aforesaid is not a fixing of rates according to the value of the property in actual use, or according to the value of the service rendered, but is an arbitrary, willful, fraudulent and unjust act and a deprivation of property, against your orator, and deprives it of the legal right to the profit of increase of business, if any, which must only result from, and be based upon, extra service and a larger supply of water, and is a fixing of an estimated revenue and not fixing of a rate or rates, or of rates based upon any [53] legal, equitable or reasonable grounds, but on an unjust and haphazard assumption that an increase of business will occur without use of extra water and extra expenditures to accomplish the same.

XXI.

And your orator further alleges that section 11 of said Exhibit "A" is also unreasonable, unjust and unconstitutional under the Constitution of the United States, and confiscatory, and is greatly inadequate as to compensation for the services therein contemplated, and that such services therein mentioned are reasonably, fairly and justly worth the sum of much more than five dollars per hydrant per month, and that the value of the property of your orator actually in use by it for this part of such service, over and above and in excess of the value of the property of your orator required and necessary for all domestic

and all other uses of water supplied by it in the premises, is largely in excess of the principal sum which, even at five per cent per annum income, would produce said rate or revenue of five dollars per month per hydrant.

That the said Board of Supervisors in February, 1900, passed an ordinance fixing, among other things, in [54] the premises as reasonable and just, considering the services rendered and to be rendered and the actual value of the property in use therefor in the premises, the rate for said hydrants at five dollars per month per hydrant; that since February, 1900, the value of said service per hydrant has not diminished, and the said property actually in use therefor has not been diminished but has been increased by large additions, and that the actual value of said service per hydrant, considering said additions, has not decreased in any respect whatever, but is larger than in February, 1900, and that at said rate of five dollars per month per hydrant the income of your orator from hydrants, for the fiscal year, ending June 30, 1913, would, according to its best information and belief, be (under normal conditions) at least $132,000 more than under said hydrant-rate fixed by said ordinance, Exhibit "A." That the service by such hydrants is to a large extent a separate and distinct and different service from, and an additional service to, and in some particulars a larger service, that is to say, by larger mains or pipes, than, the service for domestic and all other uses, and requires in numerous cases larger pipes or mains, and in some cases separate pipes and mains and cannot thus in various and

many respects be deemed an integral part of the general service and plant, and compensation therefor cannot be justly to your orator agglomerated with general service rates, or be reduced at the will of said Board to practically little or nothing without great inequitable and unconscionable injury to your orator. That such service [55] is of such a separate character that its value should be reasonably established as a distinct service and a unit.

XXII.

And your orator further alleges that the said defendant, the Board of Supervisors, in making said rates for the fiscal year 1912–13 did the same with the purpose, as your orator verily believes, by means of said ordinance so passed in June, 1912, of depreciating the value of the property of your orator, and of crippling it in its financial condition so that the defendant, the City and County of San Francisco, could buy the property of your orator at far less than its actual and reasonable value. That said defendants have repeatedly stated that the interests of the City and County of San Francisco, and its inhabitants, demand and require the acquisition by said City and County of San Francisco of the property of your orator, used in supplying water to the City and County of San Francisco, and its inhabitants; that, as your orator is informed and believes, the said defendants, members of the Board of Supervisors of the City and County of San Francisco, recognize and admit that the rates fixed by said ordinance, Exhibit "A," are inadequate to the service which will be rendered by your orator and are unfair to your orator,

and said defendants were actuated to pass, and did pass, said ordinance for the purpose of discouraging your orator from continuing in the ownership and administration of said property, and because of the fear expressed by many of said defendant supervisors that the fixing or establishing of higher rates than those [56] to be fixed and established by said ordinance would embarrass and be detrimental to the said City and County of San Francisco in litigation pending between your orator and said City and County of San Francisco, in which is involved the validity of other rate ordinances passed by the Board of Supervisors of said City and County of San Francisco, and would embarrass and be detrimental to the said City and County in conducting negotiations for the purchase of the properties of your orator.

XXIII.

And your orator alleges the fair and reasonable value of the services of your orator, to be rendered for said fiscal year 1912–13 to the said City and County and its inhabitants, will be at least $3,210,000, inclusive of taxes, operating expenses and a proper allowance for depreciation of the plant from natural causes resulting from its use, and for obsolescence and a proper allowance to provide for replacement of portions of its plant which are liable to be destroyed by extraordinary casualties and an income of $3,210,000 will not yield a fair rate of interest or remuneration by way of dividends to its stockholders upon the value of its property actually in use. That such allowance for depreciation, obsolescence and for replacement, made necessary by extraordinary cas-

ualties is a proper part of general rates to be collected by your orator.

That the water furnished and supplied by your orator is of exceptionally pure, fresh and wholesome quality, and that the property and sources of water supply and the plant of your orator are fit and ample to meet and exceed the reasonable requirements of said city and county and its inhabitants in the present and future under all conditions. [57]

XXIV.

That the said City and County and the said defendants, and each of them, have threatened and are threatening to enforce said bill or ordinance, Exhibit "A," and to prevent your orator from collecting any other rates for supplying water than those prescribed therein, and your orator alleges upon its information and belief that if it shall fail or refuse to conform to the rates therein prescribed defendants will, unless restrained by this court or your Honors, enforce or attempt to enforce the said bill or ordinance and the rates thereby fixed and will, in case of your orator's failure to observe said rates, attempt the forfeiture, or cause proceedings to be taken for the forfeiture, of its franchise and works. That the Board of Supervisors have already, in reference to the ordinance of February, 1906, attempted to pass and to record in the various counties where your orator's property is situated, a resolution which the Board of Supervisors claimed forfeited the entire plant of your orator to the City and County of San Francisco for public use for that your orator did not collect rates for the fiscal year 1906–1907 in accordance with

the ordinance passed for that year in February, 1906, and your orator alleges that said last named ordinance was and is void, and void on its face; and that by such threats and threatened action, and the acts under such threats, your orator suffered and sustained great damage and injury. Long after the passage of said resolution for the forfeiture of your orator's property said Board of Supervisors passed another resolution purporting to rescind said first named resolution, but notwithstanding [58] said rescission your orator suffered and sustained great damage by the passage of said first named resolution.

That unless it is permitted to collect such rates as will produce a fair, reasonable and just income your orator will unjustly be further irreparably damaged in the premises and will be compelled to refuse to supply water to said city and county or its inhabitants, or either of them, on the ground that said bill or ordinance so finally passed June 24, 1912, is null and void, or will be compelled, on the ground that its business is unprofitable and is run at a loss, to sell its water elsewhere than in said city and county, or to sell all of its properties to pay its bonded indebtedness, and for the purpose of paying or distributing among its stockholders a reasonable value for said stock upon its surrender and the disincorporation of your orator.

XXV.

That it is essential, meet, right, proper and necessary to the rights of your orator, present and future, that this court or your Honors by decree determine what property of your orator is in actual use in such

supply of water by it and what the value thereof is, including such franchise, and such established and going business, and also to determine the amount of annual depreciation of the property of your orator by natural use and wear and tear, and an allowance for obsolescence, and the amount to which your orator is entitled to replace portions of its plant which may be destroyed by extraordinary casualty, and what is a reasonable and just income to it, based upon such value, and what is a reasonable amount to be allowed for taxes and [59] operating expenses, and what is the fair value of the services that might be rendered by your orator in the premises for said fiscal year 1912–13, and also what is the value of the property of your orator already acquired for reasonably immediate use and what income should be allowed therefor.

XXVI.

And your orator alleges that each, all and every provision of said ordinance, Exhibit "A," is unjust, unfair, unreasonable and confiscatory and opposed to and prohibited by the provisions of the Constitution of the United States hereinbefore set forth or referred to, and is also uncertain, ambiguous and unintelligible, in that it is unjust, unfair and confiscatory, and that the provisions of said ordinance are inconsistent and are in conflict with one another.

And your orator further alleges that the provisions in said ordinance, Exhibit "A," to the effect that upon the application of any ratepayer, the Board of Supervisors shall preserve the right, upon a proper showing of cause, to require the company to put in

a meter and charge meter rates for any consumer of water, is unjust, confiscatory and unfair, and opposed to said provisions of the Constitution of the United States; and is also not a fixing of rates by the said Board, and applies to all ratepayers for payment of water rates to your orator if the Board shall so decide in the future; and is also ambiguous, unintelligible and uncertain for that it nowhere appears in said ordinance what such showing must be, but the same is left discretionary with said Board at any time during the fiscal year 1912–13 by [60] the said provision to fix another and a different rate for any ratepayer or for all ratepayers, viz., a meter rate, and is inconsistent with and opposed to a provision in section 12 of said ordinance whereby it is provided that in no case where fixed rates are provided, other than meter rates, shall water be charged at meter rates; and thereby it is also declared to be the purpose of the ordinance to provide for all dwelling-houses a fixed monthly rate which shall not be increased by the person, company or corporation supplying water, while such provision may result in a large decrease to anyone or to all consumers of water in dwelling houses, and thus produce a smaller income than was intended to be produced by said ordinance.

That said ordinance is further unfair, unjust, confiscatory and opposed to the provisions of the Constitution of the United States in the respects hereinabove set forth in that the said ordinance provides that no consumer shall be deemed guilty of waste or excessive use unless the amount of water used on his premises in any month shall exceed 50 per cent the

number of cubic feet which at regular meter rates amounts to his rated bill, and that nothing shall be deemed to be waste or excessive use until after it has passed the 50 per cent limit of the meter bill rate, and thereby said ordinance is intended to and does provide that a consumer shall be allowed free of charge to use and consume the property of your orator to the extent of 50 per cent above his regular rate by meter without payment.

And your orator further alleges that said [61] ordinance is unfair, unjust, confiscatory and opposed to the Constitution of the United States aforesaid, in the particulars aforesaid, in that it provides that after notice by mail of the discovery of waste or excessive use to the consumer your orator may charge such consumer for excessive use as therein provided and not before, and thereby deprives your orator of the rate for the water which was consumed or used by the consumer as waste or excessive use; and is also unfair, unjust, confiscatory and opposed to the provisions of the Constitution of the United States in the respects aforesaid, because the said ordinance Exhibit "A," provides that, no matter how large or how great such waste or excessive use may be or exceed, according to the other provisions of said ordinance, the regular rates provided for each individual or class of individuals, your orator shall not collect for the same, that is, said waste or excessive use, in excess of two dollars for the first month, four dollars for the second, or five dollars for any following month, though said waste or excessive use may exceed by many dollars or hundreds of dollars the amount

which the consumer according to the terms of said ordinance would be compelled to pay.

XXVII.

And your orator further alleges that in an action brought and then pending in the Superior Court of the City and County of San Francisco, State of California (which was then and is a court of record and of general jurisdiction and had jurisdiction in the premises), to set aside an order or ordinance passed in February, 1889, by the then Board of Supervisors establishing water rates, wherein the [62] said grantor of your orator was plaintiff and the City and County of San Francisco, aforesaid, and the Board of Supervisors of the said city and county, and the individual members of said Board, were defendants, on July 20, 1889, a judgment was duly given, made and entered in favor of the plaintiff against all the defendants, wherein and whereby it was found, adjudged and decreed, among other things, that at the date of the commencement of said action, to wit, on or about the 5th day of April, 1889, the value of the property of the grantor of your orator up to that time acquired, obtained, constructed and owned by said grantor in order to carry out and necessary to enable said plaintiff to fulfill the purpose of its incorporation, and in use by said plaintiff therefor, to wit, to supply the said City and County of San Francisco and its inhabitants with pure, fresh water, was then, to wit, in April, 1889, of a value exceeding $25,000,000, and that said defendants therein appealed to the Supreme Court of the State of California from such judgment and on such appeal, such

judgment was affirmed in or about the year 1890, and then became and ever since has been and is final and in full force and effect, and was then and ever since has been and still is res adjudicata as to and upon the question (among other things) of such value as the sum aforesaid, to wit, a value exceeding $25,000,000, at and on said day. That such judgment as to and upon the value aforesaid, and other things, was upon the merits in said action, that is to say, upon the law of the case upon the admitted facts alleged in the complaint, and that such value and the determination thereof was actually and necessarily included in said action and in said judgment and necessary thereto and to each thereof, and that [63] said judgment is an estoppel against each and all the defendants in this action upon said question and issue and fact of the value of said property in this paragraph above referred to, that is to say, a value exceeding $25,000,000 at said date, of the property then owned by the grantor of your orator; and ever since and now and by said judgment defendants in this action are, and at all times in this bill of complaint referred to were, estopped and debarred from placing any other or different or smaller value thereon. That all said properties were on June 20th, 1911, and ever since and now are owned by your orator and, with large additions thereto, are engaged by your orator in such supply of water; that said properties referred to in said action, and said other properties, have largely increased in value since April, 1889, to wit, by an increase in value of a sum very largely in excess of twenty-five millions of dollars, and have ever since

been by your orator and its grantor used in such supply of water. That since the commencement of said action your orator and its grantor have acquired, obtained, constructed and owned other like properties for the same purpose, and necessary therefor, and since said acquisition, and in June, 1910, and ever since and now owned by your orator for the purposes of said water works in the reasonably immediate future, and are of a value very largely in excess of seven and one-half million dollars. That the true and actual present value of all said properties is a sum in excess of $45,000,000 for property actually in use. That your orator has acquired, since the first day of July, 1904, certain properties which are now used and useful in supplying the City and County of San Francisco with water and that it paid for said properties the sum of $5,105,377.65.

XXVIII.

That neither the Constitution of the State of [64] California nor any of the laws of said State, nor said Charter, nor any ordinance of said city and county, nor any of the rules or regulations of said Board of Supervisors, either in June, 1912, or before, or since, provide or provided in any way for, or now provide for, any notice of any kind (in the premises as to the fixing of water rates) to any person supplying water in said State to the public, or in said city and county and its inhabitants, and that section One of Article XIV of the Constitution of the State of California is void and of no force or effect for that reason, and that said ordinance so passed thereunder is likewise void for that reason, and by reason

of said provisions of the Constitution of the United States for that by and under said Constitution of the State of California and said ordinance your orator is denied the equal protection of the law, and its property is taken without due process of law and the same abridge the privileges and immunities of your orator, as guaranteed by the Constitution of the United States.

XXIX.

And your orator further alleges that the rates payable by said defendant, the City and County of San Francisco, are, as it is informed, and believes, payable out of the general fund of said city and county, and that the said defendant Supervisors will, as your orator is informed [65] and verily believes, by a pretended budget for the fiscal year commencing July 1, 1912, and ending June 30, 1913, in making the levy of taxes, for said fiscal year, pretend to set aside for payment for water used by said city and county only a sum of money based on said rates in said ordinance, to wit, Exhibit "A," and intend to and will, unless otherwise directed by your Honors, reserve only said payment, that is to say, a sum of money based upon the rates set forth in said Exhibit "A," for the payment of all water so used or to be used as aforesaid during said fiscal year by said city and county, and will, as your orator verily believes, dispose of all other funds in said general fund over and above said last mentioned sum or payment, for other and different purposes than for the payment of said water for said fiscal year, and that said water so to be furnished for said last-named purposes and the services

to be rendered by your orator in said last-named premises are reasonably, fairly and justly worth much more than the said sum, and that if the said general fund be exhausted by the said Board of Supervisors of all sums in excess of said sum, for other purposes, your orator will be remediless in the premises; for that by the laws of said State of California and the Charter of said city and county, the debts and expenses of any one fiscal year cannot be paid from the revenue of any other subsequent fiscal year, and that therefore it is inequitable and unjust that the said Board of Supervisors should exhaust said general fund in excess of said sum, for other and different purposes than for the payment of water and the service last mentioned, and that it is meet and proper that the said Board [66] should by order of this court be compelled, pending this litigation and the judgment and decree therein, to retain and hold from said general fund a sufficient amount thereof to pay your orator for all water at reasonable, fair and just rates to be used by said city and county during the fiscal year 1912–1913, and that $300,000 is less than a reasonable sum for such water for said fiscal year.

XXX.

That in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, in or about the month of April, 1903, the said Spring Valley Water Works (grantor of your orator as aforesaid), as complainant, commenced an action by filing its verified bill in equity, No. 13,395, against the City and County of San Fran-

cisco and the then Board of Supervisors thereof, and the then members thereof, and by such bill, under which process and subpoena were duly issued and served on all of said defendants named in said bill, among other things, complainant sought relief, setting aside as void, unreasonable, confiscatory and unconstitutional said ordinance claimed to have been passed March 9, 1903 (a copy whereof is annexed to said bill as an exhibit, and by reference your orator prays that the same be taken as a part of this bill), and also relief in enjoining *pendente lite* the enforcement of said ordinance; and that under an order to show cause duly issued and served, and after due hearing and presentation by all parties of the facts relevant and pertinent in the premises, and full advisement, the Court did order and direct to be issued its writ and process of injunction staying *pendente lite* all proceedings [67] under and all enforcement of said ordinance, and such writ and process of injunction was duly issued and served on all of said defendants in said action No. 13,395, in the latter part of June, 1903, and ever since has been and still is in full force and effect.

XXXI.

And your orator further alleges that in an action in the same court in equity, Number 13,598, wherein your orator was complainant, and the City and County of San Francisco and the then Board of Supervisors and its then members were defendants, wherein the bill of complaint was filed in said court on the 1st day of June, 1904, it was, after full hearing, determined by the Court, on motion for an in-

junction, *pendente lite,* to grant the same, and the same was granted, upon the same grounds as in said action 13,395, and on the further ground that it was equitable, proper and right that an injunction should be issued pending the said litigation in said case, No. 13,598. And your orator further alleges that on the 2d day of May, 1905, in an action in said court, in equity, No. 13,756, wherein your orator was complainant, and the then Board of Supervisors of said city and county and the then members thereof were defendants, an injunction *pendente lite* was granted by consent on the same grounds as in the said two prior cases. That said three last named actions were, in November, 1911, determined, adjudged and decided, and that the said court rendered its decree and made its order that the said ordinance complained of was unconstitutional and void. That it is meet, equitable and right that an injunction *pendente lite* in this case, of the same form as [68] in the said three cases, should be by the Court granted. And your orator alleges that the ordinance passed in March, 1906, by the said Board of Supervisors, was not contested for that the same on the face of the proceedings was and is void.

And your orator further alleges that in an action in the same court in equity No. 14,275, wherein your orator was complainant, and the City and County of San Francisco and the then Board of Supervisors and its then members were defendants, the bill of complaint in which was filed in said court on the 31st day of May, 1907, it was, after full hearing, determined by the Court, on motion for an injunction

pendente lite, to grant the same, and the same was granted, restraining the enforcement of an ordinance adopted by said Board of Supervisors, fixing and establishing rates for water to be supplied to the City and County of San Francisco and its inhabitants for the fiscal year beginning July 1st, 1907. That said injunction was granted upon the same ground as in said action No. 13,395, and on the further ground that it was equitable, proper and right that an injunction should be issued pending the litigation. That said action No. 14,275 is still pending in said court and undetermined.

And your orator further alleges that in an action in the same court in equity, No. 14,735, wherein your orator was complainant, and the City and County of San Francisco and the then Board of Supervisors and its then members were defendants, the bill of complaint in which was filed in said court on the 22d day of June, 1908, it was, after full hearing, determined by the Court, on motion for an injunction [69] *pendente lite,* to grant the same, and the same was granted, restraining the enforcement of an ordinance to be adopted by said Board of Supervisors to fix and establish rates for water to be supplied to the City and County of San Francisco and its inhabitants for the fiscal year beginning July 1st, 1908. That said injunction was granted upon the same grounds as in said action No. 14,275, and on the further ground that it was equitable, proper and right that an injunction should be issued pending the litigation. That said action No. 14,735 is still pending in said court and undetermined.

And your orator further alleges that in an action in the same court in equity, No. 14,892, wherein your orator was complainant, and the City and County of San Francisco, and the then Board of Supervisors and its then members were defendants, the bill of complaint in which was filed in said court on the 15th day of June, 1909, an *ex parte* application for an injunction *pendente lite* was granted, restraining the enforcement of an ordinance to be adopted by the said Board of Supervisors, to fix and establish rates for water to be supplied to the City and County of San Francisco and its inhabitants for the fiscal year beginning July 1, 1909. That said injunction was granted upon the same grounds as in said action No. 14,735, and on the further grounds that it was equitable, proper and right that an injunction should be issued, pending the litigation; that the said action No. 14,892 is still pending in said court, and undetermined, and the said injunction is still in full force and effect. That the ordinance, the enforcement of which was enjoined and restrained [70] in said action No. 14,892, to fix and establish the same identical rates as were fixed and established by the ordinance, the enforcement of which was so restrained and enjoined in said action No. 14,735.

And your orator further alleges that in an action in the same court in equity, No. 15,131, wherein your orator was complainant and the City and County of San Francisco and the then Board of Supervisors and its then members were defendants, the complaint in which was filed in said court on the 27th day of June, 1910, an *ex parte* application for an injunction

pendente lite was granted restraining the enforcement of an ordinance adopted by the said Board of Supervisors, fixing and establishing rates for water to be supplied to the City and County and its inhabitants for the fiscal year beginning July 1st, 1910; that said injunction was granted upon the same grounds as in said action No. 14,892; that the said action No. 15,131 is still pending in said court and undetermined, and the said injunction is still in full force and effect; that the ordinance, so enjoined and restrained in said action No. 15,131 fixed and established the same identical rates as were fixed and established by the ordinance which was so restrained and enjoined in action No. 14,892.

And your orator further alleges that in an action in the same court in equity, No. 15,344, wherein your orator was complainant and the City and [71] County of San Francisco and the then Board of Supervisors and its then members were defendants, the complaint in which was filed in said court, on the 26th day of June, 1911, an *ex parte* application for an injunction *pendente lite* was granted restraining the enforcement of an ordinance adopted by the said Board of Supervisors, fixing and establishing rates for water to be supplied to the city and county and its inhabitants for the fiscal year beginning July 1st, 1911; that said injunction was granted upon the same grounds as in said action No. 15,131; that the said action, No. 15,344, is still pending in said court and undetermined and the said injunction is still in full force and effect; that the ordinance so enjoined and restrained in said action No. 15,344, fixed and

established the same identical rates as were fixed and established by the ordinance which was so restrained and enjoined in action No. 15,131.

That the ordinances, the enforcement of which was enjoined in said actions No. 14,735, No. 14,892, No. 15,131 and No. 15,344 respectively, fixed and established the same identical rates with the single exception hereinafter noted, as are fixed and established by the ordinance Exhibit "A," except that said ordinances, the enforcement of which was so restrained and enjoined, enacted and established rates to be collected for the fiscal years beginning July 1, 1908, July 1, 1909, July 1, 1910 and July 1, 1911, respectively; whereas, ordinance Exhibit "A" hereto fixed and established rates to be collected for the fiscal year beginning July 1, 1912. **[72]**

That the property of your orator which will necessarily be used in supplying water to said city and county and its inhabitants during the fiscal year beginning July 1, 1912, includes all the property described in the bill of complaint in said action, in equity, No. 15,344, and therein alleged to be necessary in supplying water to said city and county and its inhabitants during the fiscal year beginning July 1, 1911, and that your orator invested subsequent to May 31, 1911, and since the filing of said bill of complaint in said action in equity No. 15,131, the sum of One Million Two Hundred Sixty-three Thousand Three Hundred Seventeen and 3/100 (1,263,317.03) Dollars, for extensions and additions to its plant and for new properties, all of which will be used, and will be necessary to be used, in supply-

ing water to said city and county and its inhabitants for the fiscal year beginning July 1, 1912. That the defendants, members of the Board of Supervisors, who voted for said ordinance Exhibit "A," well knew of said injunction last referred to when passing said ordinance, but nevertheless refused to be bound thereby, or to give any heed thereto. That the said defendants, members of said Board of Supervisors, in and by the said ordinance Exhibit "A," did reduce the rates to be collected for water supplied during the fiscal year beginning July 1, 1912, below the rates fixed and established by the ordinances passed in 1908 and 1909, in this: that by the said ordinances passed in 1908 and 1909 the rates for water furnished and delivered to and for shipping were fixed at $1.50 per one thousand gallons, and by the said ordinance Exhibit "A" [73] the rates for water for shipping are fixed at double the meter rates for water supplied for other purposes, and as a result of this reduction, if your orator is compelled or required to supply water at and under the rates to be fixed by said ordinance, the income of your orator for water supplied for shipping during the fiscal year beginning July 1, 1912, will be $100,000; whereas, during the year 1908 it was $127,211.45, and during the year 1909 it was $141,282.04.

XXXII.

Your orator alleges that according to the estimates made in reference to the amount of money in gross that would be produced during the fiscal year 1912–1913 under said ordinance, Exhibit "A," and by the report of experts familiar with that business, the

same would not be in excess of $2,755,000; that after deducting therefrom the said estimated amount of operating expenses, depreciation, obsolescence and an allowance for losses by extraordinary casualty and taxes there would remain but $1,145,046, as the total income under said Exhibit "A" to your orator, while the amount of coupon interest on its present bonded indebtedness at the rate of four per cent per annum amounts to the sum of $839,480. That said estimate of $2,755,000 is, as your orator is informed and verily believes, in excess of the income which the rates fixed by said ordinance will produce. That your orator anticipates that it will obtain an income of between fifty and fifty-five thousand dollars during the fiscal year 1912–1913 from the rent of properties in use for supplying the City and County of San Francisco, and its inhabitants, with water. [74]

XXXIII.

And your orator alleges that its term of corporate existence is fifty years from and after the 23d day of April, 1903.

XXXIV.

That your orator has no plain, speedy and adequate remedy at law in the premises.

XXXV.

In consideration whereof and inasmuch as your orator can have no adequate relief except in this court, and to the end that the defendants may make, if they can, full disclosure and discovery of their alleged claims and assertions and rights in the premises, and according to the best and utmost of their remembrance, knowledge, information and belief,

full, true, direct and perfect answer make to the matters hereinbefore stated and charged, your orator brings this action and hereby waives verification to the answer of the defendants.

May it please your Honors to grant unto your orator a writ of subpoena directed to the said defendants, and each and all of them, commanding them on a day certain to appear and answer unto this bill of complaint and to abide by and perform such order and decree in the premises as to this court shall seem proper and be required by the principles of equity and good conscience.

And your orator further prays that this court and your Honors may decree as follows:

FIRST: That said bill or ordinance so finally passed by the said Board of Supervisors on June 24, 1911, is null and void and of no effect.

SECOND: That your orator is entitled to rates for supplying pure fresh water to said city and county, and its inhabitants, for the fiscal year commencing July 1, 1912, and ending June 30, 1913, so fixed that they will [75] in the aggregate afford a just, fair and reasonable compensation for the services rendered, and based upon the value of the property used therefor and of property purchased therefor to be used in the reasonably immediate future, and that will yield a sufficient annual income to your orator to pay its operating expenses and taxes and an annual sum for depreciation of plant and for obsolescence and to provide for the replacement of portions of its plant liable to be destroyed by extraordinary casualty, and to realize in addition the rate

of seven per cent per annum upon its property in actual use in so supplying said city and county and its inhabitants, and that such value of such property is at least the sum of $45,000,000 for property in actual use.

THIRD: And that the court by its mandate or other peremptory process require said Board of Supervisors forthwith to fix rates for supplying water to said city and county, and its inhabitants, for said fiscal year, so that such rates will yield to your orator its operating expenses and taxes and an annual sum for depreciation of plant, for obsolescence and to provide for the replacement of portions of its plant liable to be destroyed by extraordinary casualty, and seven per cent per annum income in addition thereto upon the value of properties in use in so supplying water as aforesaid, and at the sum aforesaid, and to afford your orator due notice and an opportunity to be heard before the said Board prior to the final passage of a bill or ordinance fixing such rates, and to allow your orator and others interested to introduce evidence and be heard respecting the reasonableness [76] and the justice of the proposed bill or ordinance.

FOURTH: That each and all of said defendants, and all consumers of water in said city and county be, pending this litigation, and perpetually at the conclusion of the litigation, enjoined from enforcing or attempting to enforce said bill or ordinance finally passed June 24, 1912, and from bringing or causing to be brought or prosecuting any suit or action against your orator, in law or in equity, to enforce

said bill or ordinance, or any forfeiture of your orator's franchise, works or property, or for any other purpose, on account of its failure or refusal to conform to the rates thereby intended to be prescribed, and from any attempt, directly or indirectly, to compel your orator to furnish water at said rates; and that, upon the filing of this bill of complaint, this court or your Honors, by order duly given and made, upon such provisos as may seem equitable, direct the defendants to show cause on a day certain why such injunction should not be issued pending this litigation, and that in the meantime, upon and from the filing of this bill of complaint until the determination of this court or your Honors under such order to show cause, a like temporary injunction and restraining order be granted by the court or your Honors.

FIFTH: That the Court, by its decree, determine what property of your orator is in actual use in such supply of water by it, and what the value thereof is, including such franchise and the fact that such business is an established and going business, and what is a reasonable and just net income to your orator based on such value, and [77] what is a reasonable amount to allow your orator for taxes on such property, and what is the legal basis for determining such amount, and what are reasonable amounts to allow your orator for such annual operating expenses and such annual depreciation of plant, and for obsolescence and for the replacement of portions of its plant liable to be destroyed by extraordinary casualty, and that is the reasonable value of the services to be rendered by your orator; and that the court also

determine that your orator is entitled to a reasonable income on said properties so acquired and within a reasonably immediate time to be brought into use in such supply, and what the value of said properties is and what the amount of income therefrom should be.

SIXTH: That this court by its decree adjudge that said judgment, dated July 20th, 1889, in said action in said Superior Court, is *res adjudicata* between your orator and defendants on the value as of that date of said properties described in the said complaint, which said judgment determined the then value of your orator's properties to be the sum of $25,000,000, and that the defendants, and each of them, are thereby estopped from placing any smaller value thereon as of that date.

SEVENTH: That, pending this action and the decree herein, the court, by its order and injunction, restrain the said defendants, and each of them, and the said Board of Supervisors, from reducing the General Fund of said city and county for other purposes than the payment for the supply of water furnished by your orator under or below a sum which will be sufficient to pay your orator during the fiscal year 1912–1913, reasonable rates for water to be furnished by it to the said city and county. [78]

EIGHTH: That all exhibits filed in said action in equity, No. 13,395, by the said Spring Valley Water Works, and in said other actions subsequently brought by your orator against the City and County of San Francisco and the Board of Supervisors thereof, at the time said actions were brought, may,

for all proceedings in this action, including the pleadings, evidence or testimony, and affidavits, be by the court deemed to be filed herein and to be used as to the court may seem meet.

NINTH: That your orator may have such other and further relief as to this court and your Honors may seem right in the premises, together with your orator's costs of suit.

EDWARD J. McCUTCHEN,
Solicitor for Complainant.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Of Counsel for Complainant. [79]

State of California,
City and County of San Francisco,—ss.

S. P. Eastman, being first duly sworn, deposes and says:

The complainant is a corporation organized and existing under the laws of the State of California. I am the Vice-President of complainant named in the foregoing Bill of Complaint, and as such Vice-President make this verification and affidavit for and on behalf of complainant. I have read the foregoing Bill of Complaint and know the contents thereof, and I state that the same is true of my own knowledge, except as to those matters therein stated on information or belief, and that, as to those matters, I believe the said Bill of Complaint to be true.

S. P. EASTMAN.

Subscribed and sworn to before me this 26 day of June, A. D. 1912.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California. [80]

[Exhibit "A" to Bill in Equity.]

BILL NO. 2162. ORDINANCE NO.——.

(New Series.) Regulating the monthly rates of compensation to be collected by any person, company or corporation engaged in the business of supplying water to the inhabitants of the City and County of San Francisco for family uses, for private purposes, for municipal uses and for all public purposes of said City and County for the year commencing July 1, 1912, and ending June 30, 1913.

Be it ordained by the people of the City and County of San Francisco as follows:

That the monthly rates of compensation for supplying water shall be as follows:

General Rates.

Section 1. For buildings occupied by a single family covering a ground surface of (not including porches):

Square Feet.	One Story.	Two Stories.	Three Stories.	Four Stories.	Five Stories.
0 to 400.....	$0.22	$0.27	$0.36	$0.41	$0.45
400 to 500.....	.27	.36	.41	.45	.54
500 to 600.....	.36	.41	.45	.54	.63
600 to 700.....	.41	.45	.54	.63	.68
700 to 800.....	.45	.54	.63	.68	.72
800 to 900.....	.54	.63	.68	.72	.76
900 to 1000.....	.63	.68	.72	.76	.86
1000 to 1200.....	.68	.72	.76	.86	.90
1200 to 1400.....	.72	.76	.86	.90	.94
1400 to 1600.....	.76	.86	.90	.94	.99
1600 to 1800.....	.86	.90	.94	.99	1.03
1800 to 2000.....	.90	.94	.99	1.03	1.08

The foregoing rates also apply to public buildings. No single rate less than twenty-two (22) cents.

For all houses one story in height, covering a greater area than two thousand square feet, there shall be added nine (9) cents for each additional two hundred square feet or fraction thereof, and the further sum of nine (9) cents for each additional story:

Additional Families.

Where a house or building is occupied by more than one family the general rate for each additional family shall be three-quarters (¾) of the foregoing rates, except:

First—Where a house or building is divided into flats, each flat having a separate entrance, and occupied by a separate family, the general rate charged shall be the same for each flat as for a single house of like dimensions.

Second—Where two or more families occupy the same floor the general rates for each family on such floor shall be the rate for the floor surface occupied by such family (the same as for a single one-story house), according to the foregoing table.

Note—The general rate includes water for general household purposes but does not include any of the following specified rates:

Special Rates—Bathing Tubs.

Section 2. Bathing tubs in private houses, each tub, $0.32.

In public houses, boarding houses, lodging houses, hotels and bathing establishments where meters are not used, each tub, $0.45.

For Horses and Cows.

Section 3. For each horse, $0.18; for each cow, $0.09.

Boarding and Lodging Houses, Etc.

Section 4. Boarding and lodging houses, not including water for baths, water closets and urinals or for water without the houses, shall be charged for each boarder and lodger within the same, in addition to the rates for private families, $0.07.

Irrigation, Private Gardens, Etc.

Section 5. Irrigation for private gardens and private grounds, one-half (½) of a cent per square yard; no monthly charge to be less than fifteen (15) cents.

Water Closets.

Section 6. For each valve closet for use of public building.....$0.45
For each valve closet for use of private dwelling..... .22
Privy vaults (connected with sewer)—
For use of public building, each seat..... .41
For use of private dwelling, each seat..... .22
All drain closets to be charged at the same rate as privy vaults.

Urinals and Stationary Washstands.

Section 7. For use of public buildings, each.$0.09
For use of private dwellings, each..... .05

Building Purposes.

Section 8. Water furnished for building purposes:
Each barrel of lime or cement.....$0.14
Each thousand of brick..... .09

Stores, Banks, Saloons, Hotels, Etc.

Stores, banks, bakeries, offices, warehouses, saloons, groceries, eating houses, barber shops, butcher shops, book binderies, blacksmith shops, confectioneries, hotels, lodging houses, boarding houses, churches, halls, laundries, photograph galleries, printing offices, steam engines, greenhouses, markets, market stalls, horse troughs, soda fountains and other places of business, each to be charged according to the estimated quantity used, from eighty-one cents ($0.81) to five and 40–100 dollars ($5.40), or by meter at meter rates.

Fire Pipes.

Section 9. Meters shall be applied to all pipes used specially for fire protection, and monthly bills shall be charged for the same at regular meter rates, provided, however, that the monthly bill shall not be less than fifty (50) cents for each one-half (½) inch of diameter of pipe used.

Meter Rates.

Section 10. Water furnished for any and all purposes not embraced in the above shall be supplied by meter at the following rates:

The first 2,000 cubic feet used (between 0 and 2,000 cubic feet) shall be charged for at the rate of twenty-five (25) cents per 100 cubic feet.

The next 2,000 cubic feet used (between 2,000 and 4,000 cubic feet) shall be charged for at the rate of twenty-four (24) cents per 100 cubic feet.

The next 2,000 cubic feet used (between 4,000 and 6,000 cubic feet) shall be charged for at the rate of twenty-two (22) cents per 100 cubic feet.

The next 2,000 cubic feet used (between 6,000 and 8,000 cubic feet) shall be charged for at the rate of twenty-one (21) cents per 100 cubic feet.

The next 2,000 cubic feet used (between 8,000 and 10,000 cubic feet) shall be charged for at the rate of twenty (20) cents per 100 cubic feet.

The next 5,000 cubic feet used (between 10,000 and 15,000 cubic feet) shall be charged for at the rate of nineteen (19) cents per 100 cubic feet.

The next 5,000 cubic feet used (between 15,000 and 20,000 cubic feet) shall be charged for at the rate of eighteen (18) cents per 100 cubic feet.

The next 5,000 cubic feet used (between 20,000 and 25,000 cubic feet) shall be charged for at the rate of seventeen (17) cents per 100 cubic feet.

The next 5,000 cubic feet used (between 25,000 and 30,000 cubic feet) shall be charged for at the rate of sixteen (16) cents per 100 cubic feet.

The next 10,000 cubic feet used (between 30,000 and 40,000 cubic feet) shall be charged for at the rate of fifteen (15) cents per 100 cubic feet.

The next 10,000 cubic feet used (between 40,000 and 50,000 cubic feet) shall be charged for at the rate of fifteen (15) cents per 100 cubic feet.

The next 10,000 cubic feet used (between 50,000 and 60,000 cubic feet) shall be charged for at the rate of fourteen (14) cents per 100 cubic feet.

The next 10,000 cubic feet used (between 60,000 and 70,000 cubic feet) shall be charged for at the rate of thirteen (13) cents per 100 cubic feet.

All water used in excess of 70,000 cubic feet per month to be charged for at the rate of twelve (12)

cents per 100 cubic feet.

No monthly meter bill to be less than one and 80–100 dollars ($1.80), except as hereinafter provided.

Upon application of any ratepayer the Board of Supervisors shall reserve the right, upon a proper showing of cause, to require the company to put in a meter and charge meter rates for any consumer of water, on such conditions as the Board may impose, as to the rental when meter is not actually used.

Meter Rates for Shipping.

Water shall be furnished and delivered by meter measurement to shipping lying alongside of the bulkhead or any of the wharves on the water front where water pipes or mains are laid, between the hours of 6 o'clock a. m. and 6 o'clock p. m., daily, upon application being made therefor, at the following rates: When supplied by reel and hose cart, $1.50 per 1000 gallons. When supplied by connection with water pipes, at rates that shall not exceed double the regular meter rates established by Section 10. The minimum charge for each separate delivery to be fifty (50) cents.

No water boat furnishing and supplying water to shipping lying at anchor within the limits of the wharves of the City and County of San Francisco shall charge a rate to exceed three dollars ($3.00) per 1000 gallons.

Hydrant Rates.

Section 11. The rates of compensation to be collected for water supplied by and through hydrants to the City and County of San Francisco shall be two dollars and fifty cents ($2.50) per month for each

hydrant for fire purposes and flushing of sewers.

Prevention of Waste.

Section 12. Prevention of waste or excessive use:

In no case where the fixed rates above provided other than meter rates, are applicable, shall any charge for water be made by meter rates, it being the purpose of this Ordinance to provide for all dwelling houses a fixed monthly rate which shall not be increased by the person, company or corporation supplying water.

Provided, however, that for the purpose of discovering and repressing waste or excessive use, all persons, companies or corporations shall have the right in all cases to apply and maintain meters to measure the water used or consumed, and to charge and collect for waste or excessive use under the condition and to the extent hereafter provided in this section, and not otherwise.

No consumer shall be deemed guilty of waste or excessive use unless the water used or consumed upon his premises in any month shall exceed by fifty (50) per cent the number of cubic feet which at regular meter rates amount to his rated bill, in which case such excess shall be deemed waste or excessive use.

Immediately after the discovery of any waste or excessive use, the consumer shall be notified thereof by the person, company or corporation supplying water by notice mailed to his address or to the agent or person to whom his water bills are presented for collection.

After such notice the consumer may be charged and there may be collected from him for any waste or

excessive use thereafter occurring upon his premises at regular meter rates, but such charge or collection shall not exceed for the first month the sum of two dollars ($2.00), for the second month the sum of four dollars ($4.00), or for any following month the sum of five dollars ($5.00).

Board of Public Works to Examine Complaints, Etc.

It shall be the duty of the Board of Public Works, by its Gas, Water and Electrical Inspector of this City and County, to inquire into all cases of complaints by water consumers as to charges made against them for waste or excessive use under the foregoing provisions of this section, and to adjust such charge as follows:

Any water consumer against whom a water bill is presented containing a charge for waste or excessive use of water may within five days after such bill is presented to him (provided that he first pay the fixed rate charged on such bill, exclusive of the charge made for said alleged waste or excessive use) make complaint to said inspector that such charge is incorrect, whereupon the said inspector shall promptly inspect the premises of the consumer so complaining and cause a test to be made of the water meter upon said premises, and from such inspection and test and subsequent inspection and test as said inspector may see fit and proper to make shall determine as near as can be the amount of water used, consumed or wasted upon said premises during the period covered by said bill. As soon as such determination is made and within twenty (20) days after the said complaint is made said inspector shall make a certificate stating

the amount of water so determined to have been used, consumed or wasted, and showing the true and correct amount, if anything, which may be charged against and collected from said consumer under the foregoing provisions of this section for waste or excessive use, and shall immediately transmit such certificate to the person, company or corporation supplying water, and also a copy thereof by mail to the water consumer.

That said certificate shall be conclusive between the water consumer and said person, company or corporation as to the amount, if anything, which said person, company or corporation shall be entitled to collect from the consumer for waste or excessive use of water during the period covered by the bill of which complaint is made; provided, however, that if either the consumer or the water company is dissatisfied with the certificate of the water inspector appeal may be taken within five (5) days to the Committee on Water Rates of the Board of Supervisors, which shall, within five (5) days after such appeal, hear and finally determine the matter in dispute.

The said inspector shall keep in his office a proper record or records, showing the date of each complaint made to him, the name of the consumer complaining, the location of his premises, and stating briefly the inspection made by him of the premises and the tests applied to the meter, the time or times of such inspection and tests, and the results thereof, with the reading of the meter at each test or inspection, and all other material facts connected therewith. Such records so kept to be open for public examination in his office.

Rates—When Payable.

Section 13. All water rates, except meter rates and City and County rates, are due and payable monthly in advance.

Meter and City and County rates are due and payable at the end of each month, and upon meter rates a deposit not exceeding three-fourths (¾) of the value of the estimated quantity of water to be consumed may be required.

Notice of Discontinuance.

Section 14. Any consumer may at any time, upon payment of accrued rates, notify the company in writing to cut off or discontinue the water supply upon his premises, after which no charge shall be made for water for said premises until the use of water is resumed.

Maximum Rates Fixed.

Section 15. This Ordinance fixes the maximum beyond which no person, company or corporation shall be permitted to charge for water supplied.

Section 16. This Ordinance shall take effect and be in force on and from July 1, 1912, to June 30, 1913.

Passed for printing—Board of Supervisors, San Francisco, June 17, 1912.

Ayes—Supervisors Bancroft, Caglieri, G. E. Gallagher, Giannini, Hayden, Hilmer, Hocks, Jennings, Koshland, Mauzy, McCarthy, McLeran, Murdock, Murphy, Payot, Vogelsang.

Noes—Supervisors A. J. Gallagher, Nolan.

June 18-5t J. S. DUNNIGAN, Clerk. [81]

[Endorsed]: Filed Jun. 26, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [82]

[Order to Show Cause and Restraining Order.]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLF KOSHLAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGELSANG, as Members of the Board of Supervisors of the City and County of San Francisco,

Defendants.

WHEREAS in the above-entitled action it has been made to appear by the bill of complaint now filed herein, and the exhibit annexed thereto, which said bill of complaint is verified, and the affidavits filed by complainant, that a proper case exists for this order:

NOW IT IS ORDERED that the defendants in the above-entitled cause be and appear before the District Court of the United States, for the Northern District of [83] California, Second Division, in the courtroom of said court, in the United States courthouse and Postoffice Building, at the northeast corner of Seventh and Mission Streets, in the City and County of San Francisco, State of California, at 10 o'clock A. M., on Monday, the 8th day of July, A. D. 1912, and then and there show cause, if any they have, why they, and each of them, and all consumers of water in said City and County of San Francisco, should not be enjoined and restrained, during the pendency of this action, and from and after the 30th day of June, 1912, and until the final determination of this cause, from bringing, or causing to be brought, any suit or suits, action or actions, against the complainant, in law or in equity, to enforce the purported bill or ordinance set forth as Exhibit "A" to said bill of complaint, and purporting to have been finally passed by said Board of Supervisors of the said City and County of San Francisco on the 24th day of June, 1912, or any suit or suits, action or actions, against the complainant for the forfeiture of complainant's franchise, works or property, or for any other purpose, on account of complainant's failure or refusal

to conform to the rates purported to be prescribed by said purported bill or ordinance, and from any attempt or suit or action, directly or indirectly, to compel or require complainant to furnish water at the rates mentioned and set forth, or attempted to be enacted or established by said purported bill or ordinance, and from in anywise asserting or claiming that said purported ordinance is a valid and binding or enforceable ordinance, and that complainant is in anywise bound thereby, or compelled or required in anywise to observe the same, [84] or any of the provisions thereof, and why the said purported bill or ordinance and the enforcement thereof should not, in all respects, be suspended and enjoined, and why the defendants should not be enjoined and restrained from the commission of any of the acts complained of in said bill of complaint, and that, in the meantime and until the hearing and determination of this order to show cause, said defendants, and each and all of them, their servants, agents and employees, and all consumers of water in said City and County of San Francisco be enjoined and restrained from bringing, or causing to be brought, any suit or suits, action or actions, against the complainant, in law or in equity, to enforce said purported bill or ordinance, or any suit or suits, action or actions, against the complainant for the forfeiture of complainant's franchise or works or property, or for any other purpose, on account of complainant's failure or refusal to conform to the rates purported to be prescribed by said purported bill or ordinance, and from any attempt, suit or action, directly or indirectly, to compel the com-

plainant to furnish water at the rates purported to be fixed or established by said purported ordinance, and from in anywise claiming or asserting or demanding that complainant is compelled or required to furnish water at the rates purported to be established by said purported ordinance, and from in anywise asserting or claiming that said purported ordinance is a valid or binding or enforceable ordinance, or that complainant is in anywise bound thereby or compelled or required in any wise to observe the same, or any of the provisions thereof, and that, pending the hearing and determination hereof, said purported ordinance [85] and the enforcement thereof be, in all respects, suspended and enjoined.

IT IS FURTHER ORDERED that complainant file a bond in the sum of One Hundred Thousand ($100,000) Dollars, to be approved by the clerk of this court, which said bond shall be payable to the defendants and for the use and benefit of the defendants so far as their rights may be concerned, and for the use and benefit of each and every and all water consumers in said City and County of San Francisco and all persons who may be injured by said injunction. Said undertaking shall be conditioned that complainant will pay to the defendants or the consumers of water in said city and county, or to either or any of them, or to any person or persons who may be injured by reason of said injunction, any and all damage which they may sustain if, upon the entry of a final decree on the merits, it shall be determined that said injunction was improvidently issued. Said undertaking shall also be conditioned that complainant will abide by and perform each and all of the foregoing conditions pro-

vided in this order, and also that complainant will abide by and perform the judgment of the court on final decree, and in the event it is adjudged by this court that any charge or charges, or any portion of any charge or charges made by complainant for water during the time said injunction is in force are excessive, that such excess shall and may be returned to the person or persons from whom the same was collected.
[86]

IT IS FURTHER ORDERED that a copy of this order, certified by the clerk under his hand and the seal of this court, be served on the defendant to be restrained hereby.

Dated this 26th day of June, 1912.

(Sgd.) WM. C. VAN FLEET,
Judge.

[Endorsed]:

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Restraining Order on the therein named City and County of San Francisco, a Municipal Corporation, by handing to and leaving a Certified copy thereof with James Rolph, Jr., the Mayor of the City and County of San Francisco, a Municipal Corporation, personally at Carmel-by-the-Sea, Monterey County in said District on the 29th day of June, A. D. 1912.

C. T. ELLIOTT,
U. S. Marshal.
By T. F. Kirman,
Office Deputy.

Filed June 26, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [87]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLF KOSHLAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGELSANG, as Members of the Board of Supervisors of the City and County of San Francisco.

Defendants.

Affidavit on Behalf of the Defendants in Opposition to Motion for Preliminary Injunction.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Daniel C. Murphy, being first duly sworn, deposes and says: I am a member of the Board of Supervisors of the City and County of San Francisco, and as such, am one of the defendants in the above-entitled action. I am the Chairman of the Judiciary [88] Committee of said Board of Supervisors.

James Rolph, Jr., Mayor of said City and County of San Francisco, is at present temporarily absent from said city upon his vacation and for that reason I make this affidavit on behalf of said City and County of San Francisco and also on behalf of all the defendants in the above-entitled action.

The Constitution of the State of California, which went into effect in 1879 and has been in effect ever since said date and now is in full force and effect, provides for the fixing of water rates by the Boards of Supervisors of municipalities within said State in Article XIV, Section 1 thereof, which reads as follows:

> "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; *provided,* that the rates or compensation to be collected by any person, company,

or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this state, otherwise than as so established, shall forfeit the franchises and water-works of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use."

Article XIV, Section 2 of said Constitution further provides as follows:

"The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise and cannot be exercised except by au-

thority of and in the manner prescribed by law."

[89]

Said Constitution further provides, in Article I, Section 13 thereof, as follows:

> "No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law."

Said Constitution further provides, in Article I, Section 14 thereof, as follows:

> "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court, for the owner."

The Supreme Court of the State of California, which is the highest court in said State, in construing and interpreting the meaning of Article XIV, Section 1 of the said Constitution, in the case of Water Works v. San Francisco, which is reported in Vol. 82 of the official California Reports, at pages 305–306, has determined and limited the meaning of said section of said Constitution in the following language:

> "The whole gist of the complaint is, that the board of supervisors have *not* exercised their judgment or discretion in the matter; that they have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without any reference to what they should be, without reference either to the expense to the plaintiff necessary to furnish the

water, or to what is a fair and reasonable compensation therefor; that the rates are so fixed as to render it impossible to furnish the water without loss, and so low as to amount to a practical confiscation of the plaintiff's property. If this be true, and the demurrer admits it, a party whose property is thus jeopardized should not be without a remedy. If the action of the board of supervisors was taken as the complaint alleges, they have not in any sense complied with the requirements of the constitution, and their pretended action was a palpable fraud which might result injuriously either to the plaintiff or the city and its inhabitants, and would almost certainly work injustice to one or the other. The constitution does not contemplate any such mode of fixing rates. It is not a matter of guess-work or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the constitution provides for the fixing of rates or compensation, it means *reasonable* rates and *just* compensation. To fix *such* rates and compensation is the duty and within the jurisdiction of the board." [90]

Said Supreme Court, in again defining the meaning of said Section 14, Article I of said Constitution, in the case of San Diego Water Company v. San Diego, which is reported in Vol. 118 of the official reports of said court, at page 566, used the following language:

"The meaning of the section is, that the governing body of the municipality, upon a fair investigation, and with the exercise of judgment

and discretion, shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily, without investigation, or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty and go beyond the powers conferred upon them. Such was the conclusion reached by this court in Spring Valley Water Works v. San Francisco, 82 Cal. 286, 16 Am. St. Rep. 116, to which conclusion we adhere. Although that case was decided without the light cast on the subject by later decisions of the supreme court of the United States, and contains some observations which perhaps may require modification, we are satisfied with the correctness of the conclusion there given to this section of the constitution."

Said Supreme Court of the State of California in again interpreting the meaning of said Article XIV, section 1, in the case of Contra Costa Water Company v. Oakland, reported in Vol. 159 of the official reports of said court, at page 333, has adopted the language used by the Supreme Court of the United States in its interpretation of the aforesaid section of the State constitution in the following language:

"As is the case in regard to many other legislative acts, the legislative officers in determining what will be the proper rate of compensation are necessarily obliged to use some degree of judgment and discretion, and are 'bound in morals and in law to exercise an honest judgment as to all matters submitted to their official determina-

tion.' (Spring Valley Water Works v. Schottler, 110 U. S. 354, (4 Sup. Ct. 48, 28 L. ed. 173)."

Affiant further alleges that the above quoted interpretations of said Article XIV, Section 1 of the Constitution of the State of California are a final determination by the highest court [91] in the State of California of the meaning of the aforesaid section of the said State Constitution.

Affiant further alleges that he was present at all the sessions of the Board of Supervisors of the City and County of San Francisco and of the committees thereof at which the fixing of water rates for the fiscal year 1912–13 were considered by said Board. The Spring Valley Water Company, the complainant in the above-entitled action, had notice of all said meetings and prior to the said meetings and hearings said company filed with said Board of Supervisors its statements in writing showing the value of its properties as claimed by said complainant company and the rate of return to which said company alleged that it was entitled from the rates to be fixed for said fiscal year. Representatives of said complainant company attended the various meetings of said Board of Supervisors and its committees at which the fixing of said water rates was discussed, and considered and participated therein and said rates were fixed after a full and fair opportunity given to the representatives of said complainant company to make any and all showings which the officers of said company might desire, with regard to the sufficiency or adequacy of said rates.

Affiant further alleges that the alleged cause of ac-

tion set forth in the bill of complaint in the above-entitled action does not really and substantially involve a dispute or controversy properly within the jurisdiction of the above-entitled court; and for that reason the said court has no jurisdiction of the alleged cause of action set forth in said bill of complaint.

Affiant further prays, on behalf of all the defendants in the above-entitled action that the prayer of complainant for the issuance of a writ of temporary injunction in the above-entitled action be denied and that said bill of complaint be ordered [92] dismissed for want of jurisdiction in said above-entitled court.

DANIEL C. MURPHY.

Subscribed and sworn to before me this 12th day of July, 1912.

H. I. PORTER,

Deputy County Clerk in and for the City and County of San Francisco, State of California.

Service by copy of within original is hereby admitted this 13th day of July, 1912.

PAGE, McCUTCHEN, KNIGHT & OLNEY,

Solicitors for Complainant.

[Endorsed]: Filed July 15, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [93]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLF KOSHLAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGELSANG, as Members of the Board of Supervisors of the City and County of San Francisco,

Defendants.

Order of Injunction.

The above-entitled action having come on duly for hearing before this Court, and arguments having been heard, and the Court having considered the same, and it appearing to the Court that an injunction, as hereinafter provided, should issue,

NOW, THEREFORE, IT IS HEREBY ORDERED that an interlocutory injunction issue in the above-entitled [94] action, enjoining and restraining defendants, and each of them, and all consumers of water in the City and County of San Francisco, during the pendency of this action and until the final determination thereof, from bringing or causing to be brought, any suit or suits, action or actions, against complainant, in law or in equity, to enforce the bill or ordinance set forth as Exhibit "A" to said bill of complaint and finally passed by said Board of Supervisors of the City and County of San Francisco, on the 24th day of June, 1912, or any suit or suits, action or actions, against complainant for the forfeiture of its franchise, works or property, or for any other purpose, on account of complainant's failure or refusal to conform to the rates prescribed by said bill or ordinance and from any attempt, or suit, or action, directly or indirectly, to compel or require complainant to furnish water at the rates mentioned and set forth, or enacted, or established by said bill or ordinance, and from in anywise asserting or claiming that said ordinance is a valid and binding or enforceable ordinance, and that complainant is in any wise bound thereby or compelled or required, in anywise, to observe the same, or any of the provisions thereof.

AND IT IS FURTHER ORDERED that, pending the hearing and final determination of the above-entitled action, said ordinance and the enforcement thereof be in all respects suspended and enjoined.

AND IT IS FURTHER ORDERED that com-

plainant file a bond in the sum of Fifty Thousand (50,000) Dollars, to be [95] approved by the Clerk of this court, which said bond shall be payable to the defendants and for the use and benefit of defendants so far as their rights may be concerned, and for the use and benefit of each and every and all water consumers in said City and County of San Francisco, and all persons who may be injured by said injunction. Said undertaking shall be conditioned that complainant will pay to the defendants, or the consumers of water in said city and county, or to either or any of them, or to any person or persons who may be injured by reason of said injunction, any and all damage which they may sustain, if, upon the entry of a final decree upon the merits, it shall be determined that said injunction was improvidently issued. Said undertaking shall also be conditioned that complainant will abide by and perform each and all of the foregoing conditions provided in this order and also that complainant will abide by and perform the judgment of the Court on final decree and, in the event it is adjudged by this Court that any charge or charges, or any portion of any charge or charges, made by complainant for water during the time said injunction is in force, are excessive, that such excess shall and may be returned to the person or persons from whom the same was collected.

IT IS FURTHER ORDERED, pursuant to stipulation of the parties hereto, on file herein, that all amounts collected by complainant, in the above-entitled action, in excess [96] of the rates fixed by ordinance for the fiscal year beginning July 1, 1912,

be deposited and impounded each month with Mercantile Trust Company of San Francisco, pending a determination of the questions involved in said action, and that within fifteen (15) days after each monthly deposit complainant file in this court an affidavit showing in detail the name and address of each customer, or such facts as may be sufficient to identify such customer, to whom water has been furnished, and the amount collected during said calendar month from each said customer for such water in excess of the amount which he would have paid under the rates specified in said ordinance, and the total amount deposited in said bank during said month. The amounts so deposited shall be withdrawn only on checks drawn by a special master and countersigned by a Federal Judge, sitting in this court.

In order to facilitate the return of moneys so deposited, in the event of a decision or order of this Court directing such return, J. A. Schaertzer, Deputy Clerk of this court, is hereby appointed a special master to ascertain and report as to the amounts to be paid to each individual claimant and as to the identity of such claimant. He is thus selected as special master for the reason that the claimants of the fund will be extremely numerous and their identity and the amount of their claims will have to be established by incessant reference to the sworn statements of complainant which will be filed in this court and kept in the clerk's custody, and such reports can be most expeditiously and economically consulted by a special master who is an officer of this court.

IT IS FURTHER ORDERED that a copy of this order, certified by the clerk under his hand and the seal of this court, be served on defendants enjoined and restrained hereby.

Dated: San Francisco, California, July 20, A. D. 1912.

WM. C. VAN FLEET,
Judge. **[97]**

[Endorsed]: Filed July 20, 1912.

JAS. P. BROWN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. **[98]**

In the District Court of the United States, Northern District of California, Second Division.

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLF KOSH-

LAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGELSANG, as Members of the Board of Supervisors of the City and County of San Francisco,

Defendants.

Writ of Injunction.

The President of the United States of America, to The City and County of San Francisco, a Municipal Corporation, The Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as Members of the Board of Supervisors of the City and County of San Francisco, Defendants, Greeting: [99]

WHEREAS, after full hearing and consideration of the application of complainant in the above-entitled cause for a preliminary injunction, the District Court of the United States, Northern District of California, Second Division, did, by its order duly made and entered on the 20th day of July, 1912, direct that a preliminary injunction issue herein restraining and enjoining you and each of you from doing certain of the acts and things complained of

in the said complainant's bill of complaint herein, and hereinafter more particularly set forth; and,

WHEREAS, said Court directed said complainant to file in said cause an undertaking in the sum of Fifty Thousand (50,000) Dollars, conditioned that complainant will pay to defendants or to consumers of water in said city and county, or to either or any of them, or to any person or persons who may be injured by reason of said injunction, any and all damage which they may sustain if, upon the entry of a final decree on the merits, it shall be determined that said injunction was improvidently issued and that said complainant will abide by and perform each and all of the conditions of the order upon which said injunction was issued, and will abide by and perform the judgment of the Court on final decree, and, in the event it is adjudged by the Court that any charge or charges, or any portion of any charge or charges, made by complainant for water during the time this injunction is in force, are excessive, that such excess shall be and may be returned to the person or persons from whom the same was collected; and said undertaking having been duly approved and filed as directed: **[100]**

NOW, THEREFORE, in consideration of the premises, we do hereby strictly command and enjoin you, the said City and County of San Francisco, a municipal corporation, The Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar

Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as members of the Board of Supervisors of the City and County of San Francisco, and all consumers of water from the complainant herein, and all consumers of water in the City and County of San Francisco, and each of you, that you do forthwith, and until the final determination of this action, desist and refrain from bringing or causing to be brought any suit or suits, action or actions, against complainant, hereinbefore named at law or in equity, to enforce the bill or ordinance set forth as Exhibit "A" to complainant's said bill of complaint, and finally passed by said Board of Supervisors of the City and County of San Francisco on the 24th day of June, 1912, and from bringing or causing to be brought any suit or suits, action or actions, against complainant for the forfeiture of its franchise, works or property, or for any other purpose, on account of complainant's failure or refusal to conform to the rates prescribed by said bill or ordinance, and from any attempt or suit or action, directly or indirectly, to compel or require complainant to furnish water at the rates mentioned and [101] set forth or enacted or established by said bill or ordinance, and from in anywise asserting or claiming that said ordinance is a valid and binding or enforceable ordinance, and that complainant is in anywise thereby bound or compelled or required in anywise to observe the same or any of the provisions thereof.

And the foregoing we do strictly command and enjoin upon you under the penalty of the law in such case made and provided.

WITNESS the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 24th day of July, in the year of our Lord one thousand nine hundred and twelve and of our Independence the one hundred and thirty-seventh.

[Seal] JAS. P. BROWN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

RETURN ON SERVICE WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I have served the annexed Writ of Injunction on the therein named City and County of San Francisco, a Municipal Corporation, et al., by handing to and leaving a true copy and correct thereof with James Rolph, Jr., Mayor of the City and County of San Francisco, a Municipal Corporation, personally at San Francisco in said District on the 23d day of July, 1912. * * *

C. T. ELLIOTT,
U. S. Marshal.
By Paul J. Arnerich,
Deputy. [102]

RETURN ON SERVICE WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I have served the

annexed Writ of Injunction on Thos. E. Haven, an Assistant City Attorney in and for the City and County of San Francisco, by handing to and leaving a true and correct copy thereof with Thos. E. Haven as such Assistant U. S. Attorney, personally, at San Francisco, in said District on the 23d day of July, 1912. * * *

C. T. ELLIOTT,
U. S. Marshal.
By Paul J. Arnerich,
Deputy.

[Endorsed]: Filed July 26, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [103]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, et al.,

Defendants.

Petition for Allowance of Appeal from Order for Issuance of Interlocutory Injunction.

The City and County of San Francisco, a municipal corporation, The Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, An-

drew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as members of the Board of Supervisors of the City and County of San Francisco, defendants in the above-entitled suit, each conceiving itself or himself aggrieved by the order made and entered in the above-entitled cause in said court under date of July 20, 1912, wherein and whereby [104] each of said defendants, and all consumers of water in the City and County of San Francisco, were enjoined and restrained, during the pendency of said action, and until the final determination thereof, from bringing, or causing to be brought, any suit or suits, action or actions, against complainant, in law or in equity, to enforce the bill or ordinance set forth in complainant's bill of complaint in said action; or any suit or suits, action or actions, against complainant for forfeiture of its franchise, works or property, or for any other purpose, on account of complainant's failure or refusal to conform to the rates prescribed by said bill or ordinance, and from any attempt, or suit, or action, directly or indirectly, to compel or require complainant to furnish water at the rates mentioned and set forth, or enacted, or established, by said bill or ordinance, and from in any wise asserting or claiming that said ordinance is a valid and binding or enforceable ordinance, and that complainant is bound thereby, or compelled or required to observe the same,

or any of the provisions thereof, and further suspending and enjoining the enforcement of said ordinance pending the hearing and final determination of the said above-entitled action, do, and each of them doth, hereby appeal from said order to the United States Circuit Court of Appeals, for the Ninth Circuit, and they pray, and each of them prays, that this, their petition for said appeal, may be allowed, and that a transcript of the papers and records upon which said order was made be sent to the United States Circuit Court of Appeals, [105] for the Ninth Circuit, duly authenticated.

Dated: July 24th, 1912.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLF KOSHLAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGELSANG, as Members of the Board of

Supervisors of the City and County of San Francisco.

By PERCY V. LONG,
City Attorney.
THOS. E. HAVEN,
Assistant City Attorney,
Attorneys for Said Defendants. [106]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, et al.,

Defendants.

Assignment of Errors.

The City and County of San Francisco, a Municipal Corporation, The Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as Members of the Board of Supervisors of the City and County of San Francisco, defendants in the above-en-

titled suit, jointly and severally, assign the following assignment of errors, upon which they, and each of them, will rely upon their prosecution of an appeal in said suit, petition for which they file at the same time with this assignment: [107]

First: That the said District Court of the United States has no jurisdiction of the above-entitled action, and was at the time of the entry of the said order appealed from, and is, without jurisdiction to enter such order or to grant the injunction prayed for, in that the alleged cause of action set forth in the bill of complaint in the above-entitled action does not really and substantially involve a dispute or controversy properly within the jurisdiction of the said District Court of the United States.

Second: That the said District Court of the United States has no jurisdiction of the above-entitled action, and was at the time of the entry of the said order appealed from, and is, without jurisdiction to enter such order or to grant the injunction prayed for, for the reason that the acts of the Board of Supervisors of the City and County of San Francisco, in passing the ordinance complained of, as set forth in the bill of complaint in said action, were not action by the State of California, and therefore were not State action within the purview of the provisions of the Constitution of the United States.

Third: That the said District Court of the United States erred in entering the order appealed from for the reason that it appears from complainant's showing made upon the hearing of its petition for said order, that the said complainant is not entitled to the

relief [108] prayed for against the defendants, or any of them.

Dated: July 24th, 1912.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLF KOSHLAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGELSANG, as Members of the Board of Supervisors of the City and County of San Francisco.

By PERCY V. LONG,
City Attorney.
THOS. E. HAVEN,
Assistant City Attorney,
Attorneys for Said Defendants. [109]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, et al.,

Defendants.

Order Granting Defendants' Petition on Appeal.

The foregoing petition on appeal is hereby granted, and the claim of appeal therein made is allowed, upon the said defendants filing with the clerk of this court a good and sufficient bond, to be approved by the court, in the sum of Three Hundred (300) Dollars, to the effect that said defendants will prosecute said appeal to effect and answer all costs and damages in case they fail to make such appeal good, then said obligation to be void, otherwise it shall remain in full force and effect; said bond not to operate as a supersedeas bond.

Dated July 24th, 1912.

WM. C. VAN FLEET,

Judge of the United States District Court for the Northern District of California. [110]

Service of the within petition for allowance of appeal, assignment of errors and order granting defendants' petition on appeal and receipt of copies of all

thereof is hereby admitted this 24th day of July, 1912.

EDW'D. J. McCUTCHEN,
PAGE, McCUTCHEN, KNIGHT & OLNEY,
Attorneys for Complainant.

[Endorsed]: Petition for Allowance of Appeal, Assignment of Errors and Order Granting Appeal. Filed July 24, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [111]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, et al.,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, The City and County of San Francisco, a municipal corporation, The Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolf Koshland,

Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as members of the Board of Supervisors of the City and County of San Francisco, as principals, and Massachusetts Bonding and Insurance Company, a corporation duly incorporated under the laws of the State of Massachusetts, with an office at the City and County of San Francisco, in the Northern District of [112] California, and authorized by the laws of the United States to become surety upon bonds of this character, as surety, are held and firmly bound unto complainant in the above-entitled cause in the full and just sum of Three Hundred (300) Dollars, to be paid to said complainant and its successors or assigns, for which payment, well and truly to be made, we bind ourselves, our executors, representatives and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of July, A. D. 1912.

WHEREAS, lately at a session of the District Court of the United States, for the Northern District of California, Second Division, in a suit pending in said court between the above-named complainant and the above-named defendants, the said defendants having obtained from said court an order allowing their appeal to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to reverse the injunctional order entered in said cause on July 20, 1912, and a citation to said complainant is about to be issued, citing and admonishing it to be and ap-

pear in the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in San Francisco:

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said defendant shall prosecute their said appeal to effect and shall answer all damages and costs that may be awarded against them if they fail to make their appeal good, then the above obligation is to be void; otherwise it [113] is to remain in full force and effect.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLF KOSHLAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGELSANG, as Members of the Board

of Supervisors of the City and County of San Francisco,

By PERCY V. LONG,
City Attorney,
THOS. E. HAVEN,
Assistant City Attorney,
Attorneys for Defendants.

MASSACHUSETTS BONDING AND INSURANCE COMPANY.

[Seal] By FRANK M. HALL,
By S. M. PALMER,
Attorneys in Fact. [114]

Affidavit, Acknowledgment and Justification of Guarantee of Surety Company.

On this 24th day of July, 1912, before me personally came Frank M. Hall, known to me to be the Attorney in Fact, of MASSACHUSETTS BONDING AND INSURANCE COMPANY, the corporation described in and which executed the within and foregoing bond of The City and County of San Francisco et al., as the surety thereon; and who, being by me duly sworn, did depose and say: That he resides in San Francisco, State of California; that he is the attorney in fact of said Company, and knows the corporate seal thereof; that said MASSACHUSETTS BONDING AND INSURANCE COMPANY is duly and legally incorporated under the laws of the State of MASSACHUSETTS; that said Company has complied with the provisions of the Act of Congress of August 13, 1894; that the seal affixed to the within bond of the City and County of San Francisco et al., is the corporate seal of said Company, and is thereto

affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as such officer of said Company, and that he is acquainted with S. M. Palmer, and knows her to be the attorney in fact of said Company, and that the signature of said S. M. Palmer is subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, **[115]** exceed its debts and liabilities of every nature by more than the sum of six hundred (600) dollars; that BOSTON is the home of said corporation, and said corporation has designated John H. Robertson, whose office address is First National Bk. Bldg., San Francisco, as its agent to accept service on its behalf within the Ninth Judicial District of the State of California, wherein this bond is given.

FRANK M. HALL.

Sworn to, acknowledged before me, and subscribed in my presence, this 24th day of July, 1912.

[Seal] NETTIE HAMILTON,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires March 24th, 1913.

APPROVAL BY COURT.

The sufficiency of surety on within bond and said bond are hereby approved this 25th day of July, 1912,

as a cost bond on appeal, but not as a supersedeas bond on appeal.

WM. C. VAN FLEET,
Judge of the District Court of the United States, Northern District of California.

[Endorsed]: Filed Jul. 25, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [116]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,569.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLPH KOSHLAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and

ALEXANDER T. VOGELSANG, as Members of the Board of Supervisors of the City and County of San Francisco,

Defendants.

Stipulation as to Record on Appeal.

IT IS HEREBY STIPULATED by and between the respective parties to the above-entitled action as follows:

FIRST: The sole question which will be presented by appellants upon their appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the order made by the above-entitled court on July 20, 1912, granting an interlocutory injunction in said action, will be the question of the alleged **[117]** want of jurisdiction of the District Court of the United States of the cause of action set forth in the bill of complaint in said action, and the alleged want of jurisdiction of said District Court to make the aforesaid order.

SECOND: It is further stipulated that for the purposes of this appeal the order appealed from was properly made if the court below had jurisdiction of the subject matter.

THIRD: In order that the record on appeal may not be encumbered by voluminous affidavits, which are not material to the determination of the said question of jurisdiction, it is further stipulated that all affidavits filed by complainant at the time of filing its complaint may be omitted from said record on appeal, and that such record may be made up by the clerk of the above-entitled court to consist of the following documents, to wit:

1. Bill of complaint filed by complainant in said action.

2. Order to show cause and restraining order.

3. Affidavit of Daniel C. Murphy, one of the defendants in said action, filed by the defendants upon the hearing of the motion for said interlocutory injunction.

4. Papers filed by defendants in the prosecution of their appeal, together with citation on appeal, and this stipulation.

5. Order granting interlocutory injunction and writ of injunction.

FOURTH: The clerk of the above-entitled court is hereby authorized and empowered to make up said record on appeal as hereinabove set forth, and to omit therefrom all affidavits filed by complainant at the time of the filing of its bill of complaint herein. [118]

FIFTH: It is further stipulated that said appeal may be heard by said United States Circuit Court of Appeals, for the Ninth Circuit, upon the record which will be made up by the Clerk of the above-entitled court, in accordance with the terms of the foregoing stipulation.

Dated: July 31st, 1912.

EDWARD J. McCUTCHEN,
PAGE, McCUTCHEN, KNIGHT & OLNEY,
Attorneys for Complainant.

PERCY V. LONG,
THOS. E. HAVEN,
Attorneys for Defendants.

[Endorsed]: Filed August 12, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk. [119]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,569.

SPRING VALLEY WATER COMPANY,
Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants.

Clerk's Certificate to Transcript of Record.

I, Jas. P. Brown, Clerk of the District Court of the United States in and for the Northern District of California, do hereby certify the foregoing one hundred and nineteen (119), pages numbered from 1 to 119, inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled suit, as called for by the stipulation herein, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record on appeal is $74.90; and that said amount was paid by the defendants; and that the original citation issued in said cause is hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of August, A. D. 1912.

[Seal] JAS. P. BROWN,
Clerk of the United States District Court, Northern District of California.

By W. B. Maling,
Deputy Clerk of said District Court. [120]

[Citation.]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Spring Valley Water Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 24th day of August, 1912, being within thirty days from the date hereof, pursuant to an Order Allowing Appeal filed in the Clerk's office of the District Court of the United States, for the Northern District of California, Second Division, wherein the City and County of San Francisco, a municipal corporation, The Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolph Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as Members of the Board

of Supervisors of the City and County of San Francisco, are appellants and you are appellee to show cause, if any there be, why the order granting an injunction filed and rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 25th day of July, A. D. 1912.

WM. C. VAN FLEET,
United States District Judge.

Service of within Citation, by copy, admitted this 26th day of July, A. D. 1912.

EDW'D. J. McCUTCHEN,
PAGE, McCUTCHEN, KNIGHT & OLNEY,
Attorneys for Complainant.

[Endorsed]: Original. No. 15,569. In the District Court of the United States for the Ninth Circuit, Northern District of California, Second Division. Spring Valley Water Company vs. City and County of San Francisco et al. Citation. Filed July 26th, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [121]

[Endorsed]: No. 2176. United States Circuit Court of Appeals for the Ninth Circuit. The City and County of San Francisco, a Municipal Corporation, The Board of Supervisors of the City and County of San Francisco, in the State of California, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolph Koshland, Byron Mauzy, William H. McCarthy, Ralph McLeran, Charles A. Murdock, Daniel C. Murphy, Edward L. Nolan, Henry Payot and Alexander T. Vogelsang, as Members of the Board of Supervisors of the City and County of San Francisco, Appellants, vs. Spring Valley Water Company, a Corporation, Appellee. Transcript of Record upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed August 26, 1912.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

INDEX TO BRIEF

TABLE OF CASES CITED

No. 2176.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, the BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, IN THE STATE OF CALIFORNIA, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLPH KOSHLAND, BYRON MAUZY, WILLIAM H. McCARTHY, RALPH McLERAN, CHARLES A. MURDOCK, DANIEL C. MURPHY, EDWARD L. NOLAN, HENRY PAYOT and ALEXANDER T. VOGELSANG, as Members of the Board of Supervisors of the City and County of San Francisco,

Appellants,

vs.

SPRING VALLEY WATER COMPANY, a Corporation,

Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

This is an appeal from an order of the District Court for the Northern District of California, Second Division, granting a temporary injunction enjoining and restraining defendants, and each of them, and all con-

sumers of water in the City and County of San Francisco from attempting to enforce the provisions of an ordinance adopted by the Board of Supervisors of the City and County of San Francisco fixing water rates for the fiscal year extending from July 1, 1912, to June 31, 1913. The order of injunction and the writ of injunction appear in the record on pages 105 to 114.

The application for the injunction was based upon the Bill of Complaint and certain affidavits filed by complainants. The sole question involved upon this appeal is as to the jurisdiction of the District Court to entertain the action or to grant the injunction. For that reason the record in this Court has been shortened under stipulation of counsel by the omission of the affidavits filed by plaintiff which do not bear upon the question of jurisdiction. The question arising upon this appeal is presented by the allegations contained in the Bill of Complaint, and in an affidavit filed by defendants.

The action was brought to restrain the enforcement of the ordinance fixing water rates above referred to. The authority for fixing such rates is found in Article XIV, Section 1, of the California Constitution, which is set forth in full in defendants' affidavit. (Record, pp. 98-99.)

The cause of complaint as set forth in the Bill is that the rates fixed by the ordinance are unjust, unreasonable and confiscatory in that they do not provide a sufficient income for the complainant; and further that the said ordinance was passed without consideration of the value of complainant's properties and with the ulterior motive of depreciating the value of complain-

ant's property. The objection of complainants to the rates fixed by the ordinance is further shown by the following references to and quotations from its Bill of Complaint.

It is alleged that complainant "is fairly entitled to "have and receive, as rates for water supplied by it to "said City and County of San Francisco, and its in- "habitants, an income which will realize at least seven "per cent upon the actual value of the actual property "in use in furnishing and supplying said water, and, "in addition thereto, its actual operating expenses and "the amount of taxes levied for state and city and "county and county and other purposes," and a sum for depreciation and replenishment of its plant. (Complaint, par. V, Record, p. 37, fol. 35.)

It is further alleged as follows:

> "That said bill or ordinance is, and the rates purported to be fixed thereby are, wholly void, null, unjust, unreasonable, fraudulent and unconstitutional under the said provisions of the Constitution of the United States, and oppressive and confiscatory and ambiguous, uncertain and unintelligible and that the said rates do not permit of, or provide for, a just or reasonable compensation for water to be supplied during said year by your orator, or any other person, to said City and County and its inhabitants, and that if said bill or ordinance is enforced your orator's gross income for said fiscal year, after deducting operating expenses and taxes, a proper charge for depreciation and obsolescence, and a proper charge for replacement of portions of your orator's plant which may be destroyed by extraordinary casualty, will be insufficient to pay any

dividend whatever during said fiscal year to the stockholders of your orator in excess of two per cent upon the value of the property of your orator necessary to be used in supplying water to said City and County and its inhabitants." (Complaint, par. XIX, Record, p. 53.)

And again in paragraph XVI, Record, page 46, it is alleged:

"That this action is a case in equity arising, and that it arises, under the Constitution of the United States, and that the judicial power of the Honorable Court, above-entitled extends to and embraces this action and its issues, as your orator is informed and believes, and that the issues herein and in this action set forth involve federal questions under said Constitution of the United States and, by reason of the acts and facts and things hereinafter and hereinbefore alleged, the rates hereinafter referred to are unreasonable, unjust, fraudulent, confiscatory, ambiguous, uncertain and unintelligible and if enforced will compel your orator to conduct its said business and operations without fair remuneration, and as to certain portions of said business and operations and supply of water without any remuneration or compensation; and that said rates and said ordinance are violative of, and prohibited by, each and all of the said provisions of said Constitution of the United States, and by reason of and under said provisions are void and null; and that under said ordinance your orator would, and will, be compelled to furnish water to said city and county."

The cause of complaint against the rates is further

shown by the following quotations from the Bill of Complaint:

> "That the rates fixed by the said bill or ordinance were fixed arbitrarily and at random and by mere guesswork, and were not based upon actual values of the properties, but upon the mere whim of the said Board of Supervisors, defendants herein, and that said Board never did determine or pretend to determine the value of the property of your orator then actually in use or to be used in supplying water for said fiscal year; and that various members of said Board of Supervisors, at the very meeting at which the said ordinance was to be passed, so stated. That said rates were fixed by the said Board without any consideration of, or regard to, the rights of your orator, or to the reasonable income and revenue to which your orator is entitled, based upon the value of the works actually used by your orator in supplying water to said city and county and its inhabitants, or to a reasonable income or revenue based upon the actual value of the actual property then in use, or used and owned, by your orator in supplying water to said city and county and its inhabitants, and without regard to the amount of said interest-bearing indebtedness or bonds of your orator assumed and owned by your orator or issued by it, or the annual interest thereon, or the actual operating expenses of your orator, or the actual amount of taxes which it will be required to pay, or the right of your orator's stockholders to a reasonable or any dividend upon their said stock, and without any allowance for depreciation of your orator's plant, or for obsolescence, and without any allowance to provide for the replacement of portions of the plant of your orator destroyed by extraordinary

casualties, but in total disregard thereof, and without reference to the value of the services in the premises to be rendered by your orator, or any other person or corporation, and without taking into account at all the value of the franchise, or the going and established business, of your orator." (Complaint, par. XVIII, Record, pp. 50-51.)

"And your orator further alleges that the said defendant, the Board of Supervisors, in making said rates for the fiscal year 1912-13 did the same with the purpose, as your orator verily believes, by means of said ordinance so passed in June, 1912, of depreciating the value of the property of your orator, and of crippling it in its financial condition so that the defendant, the City and County of San Francisco, could buy the property of your orator at far less than its actual and reasonable value. That said defendants have repeatedly stated that the interests of the City and County of San Francisco, and its inhabitants, demand and require the acquisition by said City and County of San Francisco of the property of your orator, used in supplying water to the City and County of San Francisco, and its inhabitants; that, as your orator is informed and believes, the said defendants, members of the Board of Supervisors of the City and County of San Francisco, recognize and admit that the rates fixed by said ordinance, Exhibit 'A', are inadequate to the service which will be rendered by your orator and are unfair to your orator, and said defendants were actuated to pass, and did pass, said ordinance for the purpose of discouraging your orator from continuing in the ownership and administration of said property, and because of the fear expressed by many of said defendant supervisors that the fixing or establishing of higher

rates than those to be fixed and established by said ordinance would embarrass and be detrimental to the said City and County of San Francisco in litigation pending between your orator and said City and County of San Francisco, in which is involved the validity of other rate ordinances passed by the Board of Supervisors of said City and County of San Francisco, and would embarrass and be detrimental to the said City and County in conducting negotiations for the purchase of the properties of your orator." (Complaint, par. XXII, Record, pp. 57-58.)

QUESTION INVOLVED.

The sole question involved in this appeal is: Have the Federal Courts jurisdiction of an action brought by a citizen of California against the Board of Supervisors of the City and County of San Francisco to enjoin the enforcement of a municipal ordinance fixing water rates, which rates are alleged in the Bill of Complaint to be unreasonable, unjust, fraudulent, confiscatory, ambiguous, uncertain and unintelligible, and which ordinance is further alleged to have been adopted by said Board of Supervisors arbitrarily and by mere guess work and for a fraudulent purpose and with an ulterior motive?

ASSIGNMENT OF ERRORS.

The assignment of errors are: First, that the District Court of the United States had no jurisdiction of the action, and, second, that the District Court of the United States had no jurisdiction to grant the injunction.

Record, p. 118.

ARGUMENT.

SYNOPSIS.

1. The inhibitions of the fourteenth amendment to the United States Constitution are against acts by the states; and no alleged infringement of any of the rights protected by said amendment confers jurisdiction upon the federal courts unless the action complained of is an act by the state itself.

2. An act by state or municipal officers which is contrary to the express prohibitions of a statute of the state cannot be said to be the act of the state.

3. "When it comes to the question whether the ordi-
" nance of a municipality is or it not legislation by the
" state, there can be no difference between an ordi-
" nance which has been enacted *ultra vires* and an or-
" dinance which has been enacted in violation of a gen-
" eral statute of the state which prohibits the precise
" and specific act which is done by the ordinance."
(Quoted from the decision of this Court in *City and County of San Francisco* vs. *United Railroads of San Francisco,* 190 Fed. 511.)

4. The power to fix water rates conferred upon municipal authorities by the Constitution of California (Art. XIV, Sec. 1) has been defined by the Supreme Court of California to be limited to the power to fix *reasonable* rates which will provide *just compensation.* Said Court has also determined that the fixing of any other rates is *beyond the power* of the municipal authorities.

5. The construction placed upon the provisions of

the California Constitution by the highest Court of the state will be followed by this Court.

6. The water rates complained of in this action are alleged in the Bill of Complaint to be "unreasonable, "unjust, fraudulent, confiscatory, ambiguous, uncer- "tain and unintelligible." (Record, p. 46.) The Bill of Complaint further alleges that said rates " were "fixed arbirtrarily and at random and by mere guess- "work," and that the Board of Supervisors did not base such rates upon the value of complainant's property as they are required to do under the law. (Record, p. 50.) And further that said rates were fixed by the Board of Supervisors for the fraudulent purpose of depreciating the value of complainant's property. (Record, pp. 57-58.)

7. The fixing of such rates as are above alleged is a plain violation of a duty placed upon municipal officers by the Constitution of the State. It is both beyond the power of the Supervisors and contrary to the express terms of the State Constitution, as interpreted by the Supreme Court of the State. Such acts cannot be attributed to the State; and hence they do not constitute "State action."

DISCUSSION AND AUTHORITIES.

I.

The inhibitions of the fourteenth amendment to United States Constitution apply to state action only.

Seattle Elec. Co. vs. *Seattle R. S. Ry. Co.*, 185 Fed. 370;

City of Louisville vs. *Cumberland T. & T. Co.*, 155 Fed. 729;
S. F. Gas & Electric Co. vs. *San Francisco,* 189 Fed. 944;
City and County of S. F. vs. *United Railroads,* 190 Fed. 509;
Memphis vs. *Cumberland Tel. Co.,* 218 U. S. 624, 54 L. Ed. 1185;
Barney vs. *City of New York,* 193 U. S. 430, 48 L. Ed. 737.

II.

An act by municipal officers which is prohibited by a state statute does not constitute state action.

This is sustained by the same authorities as above cited under the first paragraph and by the authorities cited in those cases.

III.

In the determination of the question of whether or not a municipal ordinance is legislation by the state there can be no difference between a prohibited act and an act which is beyond the power of the municipality. The fixing of unreasonable or unjust rates is an ultra vires act of the municipality.

We apprehend that there will be no controversy in this case as to the correctness of the first two propositions above asserted. The law as to both of the matters therein set forth is settled in this circuit by the recent decisions of this Court above referred to. The District Court held that the facts in the case at bar differentiates it from the Seattle and United Railroads

cases, and that therefore a different rule should be applied. On the other hand, it was held by Judge Welborn in the Southern District of this State on February 13th of this year, that the rule announced by this Court in the two cases above referred to applied with equal force to a rate case similar to the case at bar. (*Home T. & T. Co.* vs. *Los Angeles.*) As this decision of Judge Welborn does not appear to have been reported, we annex a copy thereof to this brief as an appendix.

The argument of this brief will be directed toward attempting to prove that there is no difference in principle between a rate case and the two cases which have already been decided by this Court. In order to do this it is necessary to establish nothing more than that:

1. The fixing of unjust and confiscatory rates is an *ultra vires* act of a California municipality; and

2. That the same rule applies to an unauthorized act as to one which is prohibited by State statute.

In the United Railroads case this Court said:

> "A state may act through a municipal corporation to which it has delegated powers of legislation, but where the ordinance of such a corporation is relied upon as constituting the impairment, it must be shown to have been enacted pursuant to the legislative authority of the state. Otherwise it is not state action." (190 Fed. 510.)

What is the nature of the legislative authority conferred upon the City and County of San Francisco by Article XIV, Section 1, of the California Constitution? The Supreme Court of the State has declared that this power is limited to the power to fix *reasonable and just* rates, in the following cases:

Spring Valley W. W. vs. *San Francisco,* 82 Cal. 306;

San Diego Water Co. vs. *San Diego,* 118 Cal. 566.

In the first case it is said:

"The whole gist of the complaint is, that the board of supervisors have *not* exercised their judgment or discretion in the matter; that they have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without any reference to what they should be, without reference either to the expense to the plaintiff necessary to furnish the water, or to what is a fair and reasonable compensation therefor; that the rates are so fixed as to render it impossible to furnish the water without loss, and so low as to amount to a practical confiscation of the plaintiff's property. If this be true, and the demurrer admits it, a party whose property is thus jeopardised should not be without a remedy. If the action of the board of supervisors was taken as the complaint alleges, they have not in any sense complied with the requirements of the constitution, and their pretended action was a palpable fraud which might result injuriously either to the plaintiff or the city and its inhabitants, and would almost certainly work injustice to one or the other. The constitution does not contemplate any such mode of fixing rates. It is not a matter of guess-work or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the constitution provides for the fixing of rates or compensation, it means *reasonable* rates and *just* compensation. To fix *such* rates and compensation is the duty and within the

jurisdiction of the board. To fix rates not reasonable or compensation not just is a plain violation of its duty." (Italics by the Court.)

And in the second case it is further said:

"The meaning of the section is, that the governing body of the municipality, upon a fair investigation, and with the exercise of judgment and discretion, shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily, without investigation, or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty and *go beyond the powers conferred upon them.* Such was the conclusion reached by this court in *Spring Valley Water Works* v. *San Francisco,* 82 Cal. 286, 16 Am. St. Rep. 116, to which conclusion we adhere. Although that case was decided without the light cast on the subject by later decisions of the supreme court of the United States, and contains some observations which perhaps may require modification, we are satisfied with the correctness of the conclusion there given to this section of the constitution.

"According to this construction, the rules announced under the first head of this opinion are applicable. If the council has fixed rates so palpably unreasonable and unjust as to amount to a taking of plaintiff's property without just compensation, *it has so far exceeded the powers conferred upon it,* and the court is competent to afford redress." (Italics ours.)

In both of the above cases the point of controversy

was as to whether the courts of the State were authorized to afford relief against unjust and unreasonable rates. The contention of the municipal authorities was that the power to fix rates conferred by the State Constitution was absolute over which the Courts had no control. The Court held, however, that the Courts of the State could set aside unreasonable or unjust rates because their unreasonableness was an evidence that the fixing of the same was unauthorized—beyond the power which the State had conferred upon the municipality.

It is submitted that this principle and these authorities are conclusive of the question involved on this appeal. It must be conceded that the power exercised by a municipality in fixing rates is a power delegated by the State. In other words the city acts as the agent of the State in performing this governmental function. The Supreme Court has succinctly stated the limits of an agent's powers thus:

> "The liability of the principal depends upon the fact; 1. That the act was done in the exercise, and 2. Within the limits of the powers delegated." (*Mechanics Bank of Alexandria* vs. *Bank of Columbia,* 18 U. S. [5 Wheat.] 326-327, 5 L. Ed. 100-104.)

The exception to the above rule which is applied in favor of persons dealing with an ostensible agent, of the limitations of whose powers they have no knowledge, cannot be applied in the case of a municipality as an agent. The powers of such municipality are fixed by the Constitution and are known to every one.

There can, therefore, be no ostensible power exercised by a municipality beyond that conferred.

Much of the confusion which has arisen in considering the power of municipalities in fixing rates is due to a failure to recognize that the act of such municipal agent for the State must be performed "within the limits of the powers delegated," as well as "in the exercise" of that power. Some of the cases seem to assume that because a municipality acts in the exercise of the delegated power, its act, whether just or unjust, must necessarily be within the limits of such power.

In the first California case above referred to the Court, after referring to the fact that the water controlled by the plaintiff and the right to dispose of the same "is property which cannot be taken without just compensation," proceeds:

> "The fact that the right to store and dispose of the water is a public use, subject to the control of the state, and that its regulation is provided for by the constitution of this state, does not affect the question. Regulation, as provided for in the constitution, does not mean confiscation. If it does, then our constitution is clearly in violation of the constitution of the United States, which provides that this shall not be done." (82 Cal. 307.)

The reason why "regulation as provided for in the Constitution does not mean confiscation" is that property "cannot be taken without just compensation." Although the opinion of the Court does not in terms refer to Article I, Sections 13 and 14, of the California Constitution, it is clear that the guaranties of those

sections form the basis of the rule announced. Said sections provide:

> "No person shall * * * be deprived of life, liberty or property without due process of law."
>
> "Private property shall not be taken or damaged for public use without just compensation having first been made."

These sections are a part of the same instrument by which the power to regulate rates is delegated. It is elementary that all sections of the Constitution must be read together. When one section confers a power and another limits the exercise of the power how can it be said that the power has been delegated to be exercised freed from the limitation? As pointed out in the last quotation from the California case, if the State Constitution meant that the power existed in a municipality to confiscate property such a provision would constitute a plain violation of the Federal Constitution. The converse is equally true, viz.: a power of regulation which is so limited by the instrument by which it is conferred that it cannot be exercised unjustly or unreasonably without exceeding its limits does not conflict with such Constitution. The question at issue is not the *manner of the exercise* of a delegated power, but is the *extent of the power delegated.* In order to sustain the power of California municipalities to fix unreasonable or unjust rates, both the foregoing definitions of the nature of the power delegated, and the express limitations of the State Constitution itself must be disregarded.

It is noticeable in this connection that complainant has pleaded all the facts as to the method of fixing rates in the case at bar which the California Supreme Court has said show an attempted *ultra vires* act by the municipality. Not only are the rates alleged to be unreasonable and unjust, but it is also alleged that the rate fixing body refused to consider the value of complainant's properties, and so stated; that the rates were fixed "arbitrarily and at random and by mere "guesswork, and were not based upon actual values of "the properties, but upon mere whim of the said "Board of Supervisors"; and that they were fixed for the ulterior and fraudulent purpose of depreciating the value of complainant's properties. (See Statement of Facts.) If the Board of Supervisors has thus violated every rule and disregarded every limitation prescribed in the grant of its power to fix rates, how can such acts be imputed to the State, the grantor of the power?

If we have shown that the fixing of unreasonable or unjust rates is beyond the power conferred by the California Constitution upon the municipalities of that State, it necessarily follows that such an act is not "State action." This is expressly decided by this Court in the recent United Railroads case and is also sustained by many other authorities, among which are the following:

Risley vs. *City of Utica*, 179 Fed. 875.

In that case the City of Utica was given by a statute of the State of New York the power to contract for a supply of water for the extinguishment of fires, and to

tax property in the city to pay therefor. It made and continued a contract which was unreasonable and provided for an excessive compensation to the water company.

The Court says:

> "If the city has made an illegal or improvident and oppressive contract, it has done so 'without the authority of State law,' and 'it is for the State courts to remedy acts of State officers (the Common Council) done without authority of or contrary to State law.' If on appeal to such courts the illegal acts done in violation of the rights of the citizens of Utica under the provisions of the Constitution of the United States are upheld as legal and valid, then the State has adopted them, and they become its acts, and an appeal may be had to the courts of the United States."

And again at pages 883-4:

> "If there was no law of the State authorizing this action, then it was the act of the city officers, or State officers clothed by the State with the power of taxation, done 'without the authority of State law,' and 'it is for the State courts to remedy acts of State officers done without authority of or contrary to State law."

Owensboro Water Co. vs. *Owensboro*, 200 U. S. 38, 50 L. Ed. 361.

In that case it was held that an act of a municipal corporation diverting a fund raised by a bond issue (which issue was authorized by the law of the State) from the original purposes for which it was raised, did not constitute State action. The Court referred to the

cases which hold that the prohibitions of the 14th amendment "refer to all the instrumentalities of the "state, to its legislative, executive and judicial author- "ities," and, consequently, "whoever by virtue of pub- "lic position under a state government deprives an- "other of any right protected under that amendment "against deprivation by the state, violates the consti- "tutional inhibition, and as he acts in the name and "for the state, and is clothed with the state's power, "his act is that of the state"; and then proceeds:

> "These were all cases in which the right sought to be protected was held to have been granted or secured by the Constitution of the United States, but yet was violated by some agency or instrumentality proceeding under the sanction or authority of the State. But no right involved in the present case has its origin in, or is secured by, the Constitution of the United States. It is not contended that the legislative enactments, by the authority of which the city intends to establish and maintain a system of waterworks, are inconsistent either with the Constitution of Kentucky or the Constitution of the United States. The plaintiff, however, complains that the defendant city has not properly discharged its duties under the laws of the State. For the purposes of the present discussion, let this be taken as true; still, maladministration of its local affairs by a city's constituted authorities cannot rightfully concern the national government, unless it involves the infringement of some Federal right. If the city authorities have received funds from taxation which ought strictly to have been applied to take up or cancel the bonds of the city, but have been used for other municipal

purposes, and if, by reason of such misapplication of those funds, taxation may ultimately come upon the people for an amount beyond what the legislature originally intended,—if nothing more can be said,—the remedy must be found in the courts and tribunals of the State, and not in the Federal Courts of original jurisdiction, where the controversy is wholly, as it is here, between citizens of the same State. When a Federal Court acquires jurisdiction of a controversy by reason of the diverse citizenship of the parties, then it may dispose of all the issues in the case, determining the rights of parties under the same rules or principles that control when the case is in the State court. But, as between citizens of the same State, the Federal Court may not interfere to compel municipal corporations or other like State instrumentalities to keep within the limits of the power conferred upon them by the state, unless such interference is necessary for the protection of a Federal right. There has been no actual invasion here of any right secured by the Constitution of the United States; nothing more, taking the allegations of the bill to be true, than a failure of a municipal corporation to properly discharge the duties which, under the laws of the State, it owes to its people and taxpayers. And there is here no deprivation of property without due process of law within the meaning of the 14th Amendment, even if it be apprehended that the defendant city may, at some future time, impose a tax in violation of its duty under the laws of the State."

IV.

Federal Courts are bound by the interpretation placed upon provisions of a state constitution by the highest court of the state.

Nesmith vs. *Sheldon,* 7 How. 812-818, 12 L. Ed. 925-927.

"It is the established doctrine of this court, that it will adopt and follow the decisions of the state courts in the construction of their own constitution and statutes, when that constitution has been settled by the decision of its highest judicial tribunal."

Webster vs. *Cooper,* 14 How. 489-504, 14 L. Ed. 510-517.

"In ascertaining what that law is, this court looks to the decisions of the highest court of the State; and where the question turns upon the construction to be given to the Constitution of the State, and we find a construction made by the highest State Court, very soon after the Constitution was formed, acquiesced in by the people of the State for nearly thirty years, and repeatedly confirmed by subsequent judicial decisions of that court, we cannot hesitate to adopt it, and apply it to this case, to which, in our judgment, it is justly applicable. Such has been the uniform course of this court. *McKeen* v. *Delancy's Lessee,* 5 Cr. 22, *Polk's Lessees* v. *Wendell,* 9 Cr. 87; *Gardner* v. *Collins,* 2 Pet. 58; *Shelly* v. *Guy,* 11 Wheat. 351; *Green* v. *Neal,* 6 Pet. 291, are some of the cases in which this course has been followed, and its reasons explained. The question has usually been concerning the construction of a statute of a state. But we think there is no sound distinction between the construction of a law en-

acted by the Legislature of a state, and the construction of the organic law ordained by the people themselves. The exposition of both belongs to the judicial department of the government of the State, and its decision is final, and binding upon all other departments of that government, and upon the people themselves, until they see fit to change their constitution; and this court receives such a settled construction as part of the fundamental law of the State."

Wade vs. *Travis Co.*, 174 U. S. 500-508, 43 L. Ed. 1060-1064.

"In determining what the laws of the several states are, which will be regarded as rules of decision, we are bound to look not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them." (Citing numerous cases.)

West vs. *Louisana*, 194 U. S. 258-261, 48 L. Ed. 965-969.

"We are bound by the construction which the state court gives to its own constitution and statutes and to the law which may obtain in the state, under circumstances such as those existing herein."

Fairfield vs. *County of Gallatin*, 100 U. S. 55, 25 L. Ed. 544.

In this case the United States Supreme Court changed its construction of a State Constitution to conform to the construction placed upon the constitutional provisions by the Supreme Court of the State, subsequent to the first decision of the Federal Court.

The rule of the above case is followed in

New Orleans etc. Co. vs. *Southern etc. Co.,* 36 Fed. 833.

In the latter case the United States Circuit Court of Louisiana held that in construing the laws of Louisiana it was bound to follow the decisions of the State Court rather than those of the United States Supreme Court.

Encyclopedia of U. S. Supreme Court Reports, vol. 4, p. 31.

"It is the province of the supreme court of a state to construe its own constitution and laws."

V.

CONSIDERATION OF CASES ALLEGED TO HAVE BEEN SIMILAR TO THE CASE AT BAR IN WHICH THE JURISDICTION OF FEDERAL COURTS HAS BEEN UPHELD.

The motion for a preliminary injunction in the case at bar was granted by the Judge of the District Court without the rendition of any opinion, such ruling being based upon the opinion of the same Judge in a similar case, to-wit:

S. F. Gas & Electric Co. vs. *City and County of San Francisco,* 189 Fed. 943.

The opinion in this last case is as forcible a presentation as can be made in favor of the jurisdiction of Federal Courts in rate cases. We respectfully call attention, however, to what seems to us to be erroneous

in the reasoning of that decision and the application of the cases therein cited. Upon page 944 of the opinion referred to it is said:

> "This is predicated upon the argument that, conceding that the state has vested in a tribunal or functionary full and plenary power, as here, to do a certain thing, an act done under such authority is not the act of the state in the sense here involved, unless it be so done as to be legally unassailable."

And again on page 949 of the opinion it is stated that the case then at bar was

> "in all material respects analogous to the one where a state has conferred certain jurisdiction upon its courts, where acting within the limits of that jurisdiction no one may question that the decision of a state court is to be regarded as much the act of the state, whose majesty it represents, when it decides wrong, as when it decides right, since it is still, in either event, acting under the cloak of state authority."

These citations do not seem to us to fully recognize the contention of appellants in this case. It is not conceded that *full and plenary* power to fix rates has been delegated by the State to a municipality. On the other hand, it is contended that whatever power has been delegated is a *limited* one and the Supreme Court of California has so decided. The contention here made is that the act of the Board of Supervisors in fixing such rates as are alleged in the bill of complaint in this action is not within the limits of the

power delegated. In that respect the act of rate fixing presents a very different aspect from the act of a Court which undoubtedly has full and plenary power to decide controversies rightfully or wrongfully. In other words the distinction between an act "under the authority" of a delegated power and "within the limits" of that power does not seem to us to be recognized in this opinion.

It is further submitted with regard to the opinion referred to that there is a material difference between the act of a municipal corporation repudiating a contract theretofore entered into by that corporation and the act of the same corporation in fixing rates under the constitutional authority. Some of the cases cited in the opinion of the District Court involved the effect of franchises granted by municipal authorities which were held to be inconsistent with and a repudiation of contract obligations arising out of other franchises previously granted. Such acts are distinguished from a mere *ultra vires* assertion of power. For that reason it is submitted that those cases are not authority as to the question now before the court.

In the case of *Raymond* vs. *Chicago Union Traction Co.*, 207 U. S. 20, 52 L. Ed. 78, referred to on page 946 of the opinion, the State Board of Equalization, against which the action was brought, is stated in the opinion to have been "clothed with the state's powers."

As pointed out by Judge Wellborn in the Home Telephone case there is a material difference between a state body of this character acting under the law of the State Legislature and the act of a municipal body acting under delegated power.

In *Michigan Central Ry. Co.* vs. *Powers,* 201 U. S. 245, 50 L. Ed. 744, the action was brought against the Auditor General of the State to restrain the enforcement of a law of the state and the same distinction applies.

In *Des Moines City Railway Company* vs. *City of Des Moines,* 151 Fed. 854, the question presented was as to the conflicting rights alleged to be held under the grant of two street railway franchises. It was held that the granting of a second franchise was an attempted impairment of the contract created by the first and therefore was not simply an *ultra vires* act but was a breach of a contract. The Court said, page 861:

> "The entire error is in assuming that the resolution of November 21, 1905, is *ultra vires,* instead of saying that it is a repudiation, and an attempted impairment of a contract."

The decision is based upon the ground that the city authorities had recognized and construed the first ordinance as being one granting a perpetual authority to the company therein named and hence that the city could not repudiate that contract. The opinion suggests that a different rule as to jurisdiction might apply if the act complained of was simply an *ultra vires* act of the municipal body.

In *Manigault* vs. *S. M. Ward Co.,* 123 Fed. 707, the action was brought to enjoin the erection of a dam which was being erected under direct authority of an act of the Legislature of South Carolina. The ground of the objection was that such a structure would interfere with the navigation of a navigable stream, which is

prohibited by the constitutions both of the United States and the State of South Carolina. There was no question here but that the acts complained of were being done under full legislative authority of the state. The point of the decision is, that when an act admittedly violates the provisions both of the United States and the State constitution the complainant has his choice of either a Federal or State forum. We do not question the correctness of such a decision but do not see that it bears on the question now before the court.

In *Ozark-Bell Telephone Co.* vs. *City of Springfield,* 140 Fed. 666, there is no consideration of the limits of the power conferred by the state upon the city. The court say, page 669:

> "Since the city was empowered by the Legislature of the State to act, the action taken was the action of the State through one of its agencies."

The correctness of this view may be conceded provided that there is no limitation upon the power by which the Legislature of the State has authorized the city to act; but if such limitation exists an act beyond such limits would not be the act of the State.

The decision in the *City of Louisville* vs. *Cumberland T. & T. Co.,* 155 Fed. 725, was to the effect that the Federal Court had no jurisdiction of the action for the reason that the complaint alleged that no power to regulate rates had been granted to the city. If the decisions of the Supreme Court of California to the effect that no power to fix unreasonable or unjust rates has been delegated to the city are followed, this last case is authority for appellants in the case at bar. In

other words, in the case at bar no power has been conferred upon the city to fix rates of the character and in the manner alleged in the Bill of Complaint in this action.

The case of *Citizen's Railroad Company* vs. *City Street Ry. Co.,* 56 Fed. 746, is similar to the Des Moines case above referred to in that it involves the attempt of a municipality to repudiate a grant of authority under a street railway franchise. Immediately following the quotation from this opinion which is found in the opinion of the District Court in the San Francisco Gas and Electric Company case the Court says:

> "If the law of the state or a municipal grant under its authority, is a valid enactment, except for its repugnancy to the provisions of the constitution which prohibits a city from passing any law impairing the obligation of contracts then such repugnancy presents a federal question and gives this court jurisdiction."

The above quotation suggests the same difference between a repudiation of a contract liability and an act of a municipal body in fixing rates under a delegated authority, which is hereinabove discussed in connection with the Des Moines case.

VI.

Scope of this Brief.

We have intentionally omitted from this brief any discussion of the recent decisions of this court in the Seattle and United Railroads case or of the authori-

ties therein relied upon. Nothing that can be said herein will add force to the logic of those decisions. The order of the Supreme Court made on June 7, 1912, denying the petition of appellees in the latter case for a writ of *certiorari* shows that Court to be entirely satisfied with the decision of this Court.

As stated in a preceding portion of this brief it is submitted that those decisions settle the law in this circuit to the effect that an act of a municipal body which is contrary to the provisions of a State law is not State action. It is further submitted that the same principle must apply to an act of a municipal legislative body which is beyond the power delegated to it, and, that therefore, all that is necessary for appellants to establish in this case is that the fixing of such rates as are alleged in the Bill of Complaint was beyond the power of the Board of Supervisors of the City and County of San Francisco. That question has been settled by the decisions of the California Supreme Court hereinabove cited.

We have also intentionally omitted to burden this brief with the citation and discussion of many cases bearing on the point involved in this appeal, believing that our position is sustained by the cases cited.

It is respectfully submitted that the District Court had no jurisdiction of this action, and the order appealed from should therefore be reversed.

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APPENDIX.

Decision of Judge Welborn in Home Telephone case, referred to in foregoing brief.

In the District Court of the United States, for the Southern District of California, Southern Division.

C. C. No. 1685.

HOME TELEPHONE & TELEGRAPH COMPANY, a corporation, Complainant, vs. THE CITY OF LOS ANGELES et al., Defendants.

CONCLUSIONS OF THE COURT ON MOTION FOR A TEMPORARY INJUNCTION.

The main, if not only, question on this hearing relates to the meaning and effect of the decisions hereinafter cited of the Circuit Court of Appeals of this Circuit.

With great deference to the learned judge, who wrote the opinion in *San Francisco Gas & Electric Co.* vs. *City and County of San Francisco et al.,* 189 Fed. 943, I am unable to adopt his interpretation of *Seattle Electric Company* vs. *Seattle R. & S. Ry. Co.,* 185 Fed. 365; on the contrary, the latter case, it seems to me, holds directly, that, where an ordinance of a city is prohibited by the constitution of the State, that ordinance for the purpose of Federal jurisdiction, is not State action.

The city of Seattle had general power to grant franchises for street railways. This is not expressly stated in the bill, but it must be true, otherwise the complain-

ant itself would have had no standing in court, as the rights it sought to protect depended upon a franchise granted by the same municipality. Therefore the ordinance complained of was not *ultra vires,* but simply an improper or illegal exercise of a general power, and the court held squarely, that said ordinance could not be considered State action, because it was prohibited by the State constitution.

A petition for rehearing was filed, in which, referring to the authorities on which the court based its decision, it was said:

"An examination of these authorities shows that the rule under consideration in all of them is this only: That the Circuit Court has no jurisdiction where the acts against which relief is sought are acts 'of state officers done without authority of, or contrary to, state laws,' or the threatened action is under 'an ordinance to which the state has not in any form given or attempted to give the force of law' The case of *Barney* vs. *City of New York, supra,* was a case of the first kind. The case of *Hamilton Gas Light Co.* vs. *Hamilton City, supra,* was a case of the second kind. The cases from which the statement contained in the Encyclopedia above cited is drawn, and which are cited in a foot note in support of the contention, are all of the one character or the other. *In no one of them was the point involved or decided that because the action in question was in violation of the state constitution it was therefore not the act of the state and the protection of the fourteenth amendment to the United States constitution accordingly was not to be invoked against it."*

Representatives of the Spring Valley Water Company of San Francisco, appearing as friends of the court, said:

"The public attention already given to this portion of the opinion (portion above quoted) is sufficient evidence of the interpretation likely, at any rate, at first glance, to be put upon it. It has been generally declared that the principle thus laid down necessitates the dismissal of actions instituted by public service corporations in the United States Circuit Court to enjoin the collection of rates fixed by public authorities, but claimed to be confiscatory. It seems to us that the opinion in its present form is susceptible of this construction."

The petition for rehearing was denied by the Court.

The construction placed upon the Seattle case by the periodicals referrred to in *San Francisco G. & E. Co.* vs. *City and County of San Francisco, supra,* namely; 23 Green Bag 123 and 4 Lawyer & Banker 132, accord with the conclusion which I have above announced.

Furthermore, a like question was subsequently before the Circuit Court of Appeals of this Circuit in *City and County of San Francisco* vs. *United Railroads of San Francisco,* 190 Fed. 507, advance sheets, and there the court said:

"In that case" (the Seattle case) "the ordinance which was complained of and which it was said would operate to deprive the complainant of its property without due process of law, was alleged in the bill to have been granted illegally and without right and to be 'without authority in law, and null and void and of no force and effect.' We held, following the cases

above cited, that, taking these averments to be true, the ordinance complained of was not the act of the state and that there was no federal question involved. When it comes to the question whether the ordinance of a municipality is or is not legislation by the state, there can be no difference between an ordinance which has been enacted *ultra vires* and an ordinance which has been enacted in violation of a general statute of the state which prohibits the precise and specific act which is done by the ordinance. In neither case is the ordinance state action, for in both cases it is void under the state law. Whether or not the ordinances complained of here would in fact, if carried out, have the effect to impair the obligation of the appellee's contract, we do not undertake to decide. What we hold is that the averments of the bill itself exclude the case from the cognizance of the Federal Court as a case arising under the constitution of the United States by alleging that the very ordinances which the appellees relied upon as constituting a violation of its contract have been enacted in violation of the positive law of the state."

It is true, that the bill in the present case alleges, that, if the ordinance complained of "is enforced, and your complainant thereby prevented from charging and receiving higher rates than the rates fixed by said ordinance, the State of California will thereby deprive your complainant of its property without due process of law," etc. This charge, however, that the ordinance complained of is State action, is but a legal conclusion, while the facts alleged are, that the ordinance, if confiscatory, as shown by the bill, is directly pro-

hibited by the Constitution of the State, which, in Article I, Section 13, expressly provides, among other things:

"No person shall * * * be deprived of life, liberty or property without due process of law."

Thus, the case at bar comes within the rulings of the Circuit Court of Appeals in the Seattle and San Francisco cases, and is precisely covered by the conclusions of the court in the latter case as follows:

"What we hold is that the averments of the bill itself exclude the case from the cognizance of the Federal Court as a case arising under the constitution of the United States by alleging that the very ordinances which the appellees relied upon as constituting a violation of its contract have been enacted in violation of the positive law of the state."

I know of no case where the Supreme Court of the United States has held, that an ordinance of a city manifestly in violation of an express provision of the state constitution is action by the state. It is true, that, in *Des Moines City Railway Co.* vs. *City of Des Moines*, 151 Fed. 854, the trial court so held, but, on appeal, the Supreme Court, without making any reference to the views of the trial court, reversed its decision on another ground. (214 U. S. 179.)

In *Raymond* vs. *Chicago Traction Company*, 207 U. S. 20, the act complained of was that of the State Board of Equalization, which was "one of the instrumentalities provided by the State for the purpose of raising the public revenue by way of taxation."

In *Michigan Central R. Co.* vs. *Powers*, 201 U. S. 245, and in *Manigault* vs. *S. M. Ward Company*, 123

Fed. 127, affirmed in 199 U. S. 473, the acts complained of were statutes enacted by the legislatures of the States.

Said agencies, the Board of Equalization and the State legislatures, are distinguishable from a municipal body, which does not act in the name of the State, and is not created for general State purposes, but purely local needs, and, while under some circumstances the act of the latter may be considered the act of the State, it may well be said, that its ordinance obviously in violation fo a positive law of the State is not the act of the State.

Following the decision of the Circuit Court of Appeals of this Circuit in the Seattle and San Francisco cases, as above construed, I hold, that the ordinance complained of in the case at bar is not the act of the State, and accordingly the application for a temporary injunction will be denied, for lack of Federal Jurisdiction.

OLIN WELLBORN,
Judge.

[Endorsed]:

C. C. No. 1685 U. S. District Court, Southern District of California. Southern Division. *Home Telephone & Telegraph Co.* vs. *The City of Los Angeles et al.* Conclusions of the Court on Motion for a temporary Injunction. Filed Feb. 13, 1912. WM. M. VAN DYKE, Clerk. By C. E. SCOTT, Deputy Clerk.

No. 2176

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO (a municipal corporation) et al.,

Appellants,

vs.

SPRING VALLEY WATER COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLEE.

This is an appeal from an order of the District Court, Northern District of California, Second Division, granting a temporary injunction enjoining the defendants from attempting to enforce the provisions of an ordinance adopted on June 26, 1912, by the board of supervisors of the City and County of San Francisco, fixing water rates for the fiscal year commencing July 1, 1912, and ending June 30, 1913.

The application for the injunction was based upon the bill of complaint, various affidavits filed by complainant, and one affidavit filed by defendants. It has been, by stipulation, agreed that the only question in-

volved upon this appeal is the jurisdiction of the district court to make the order referred to, and that if that court had jurisdiction, the order was properly made. That question, it is further stipulated, is to be determined by a consideration of the allegations in the bill of complaint and defendants' affidavit.

Statement of the Case.

The bill of complaint is of considerable length and we shall consider only such of its allegations as are, in our view of the case, material to the question involved on the appeal.

It is alleged that complainant is a corporation engaged in supplying water to the City and County of San Francisco and its inhabitants, and that its right to do so arises from an act passed on the 23rd day of April, 1858, entitled, "An Act to authorize George H. " Ensign and his associates to lay down water pipes in " the public streets of San Francisco", and from article XIV, section 1, of the constitution of the State of California; that, pursuant to the privileges and rights thus granted, and in order to fulfill the purposes for which it was created, complainant acquired necessary lands, water rights and reservoir sites in, and in proximity to, the said City and County of San Francisco, and constructed and installed pumping stations, pipe lines, distributing systems and other necessary works; that the present value of complainant's property is in excess of the sum of fifty million dollars; that com-

plainant has furnished, at all times in the past, and is now furnishing to the inhabitants of San Francisco an adequate supply of pure fresh water for domestic uses and fire protection; that ever since its incorporation and up to the present time it has complied with the constitution of the State of California and all the laws of the State of California; that, under the laws in force prior to 1879, the grantor of complainant was required to supply the City and County of San Francisco with water for the extinguishment of fires gratuitously, and that the rates to be charged for the supply of water to consumers were determined by a board of five commissioners; that in 1879 the constitution of that year, which is generally known as the "New Constitution", was passed, and that it was, among other things, provided in that constitution as follows:

"ARTICLE XIV.

WATER AND WATER RIGHTS.

"Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; *provided,* that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in

> the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use."

That, pursuant to the power thus delegated, and the duty thus enjoined, the board of supervisors of the City and County of San Francisco did, on June 24, 1912, pass an ordinance fixing the maximum rates to be charged to the City and County of San Francisco and the inhabitants thereof for the fiscal year commencing July 1, 1912, and ending June 30, 1913, said ordinance being set forth in full as an exhibit to the complaint; that complainant is entitled, under the provisions of the constitution of the United States, to a return of at least 7 per cent upon the value of its property used and useful in supplying the City and County of San Francisco with water, in addition to a sufficient sum to cover operating expenses, taxes, charges for depreciation, obsolescence, and loss by extraordinary casualties; that the maximum amount which would be received by complainant, if the provisions of the said ordinance were in force for the fiscal year, would be two million seven hundred and fifty-five thousand dollars; that the operating

expenses, taxes and charges for depreciation, obsolescence and loss by extraordinary casualties, would be in excess of one million six hundred thousand dollars; that there would remain, as the total income to be derived by complainant during said fiscal year, a sum not in excess of one million one hundred and forty-five thousand dollars;

> "that it is provided in and by the fifth amendment to the constitution of the United States that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation, and that by the fourteenth amendment to the constitution of the United States it is further provided that 'no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law'; * * * that this action is a case in equity arising, and that it arises, under the constitution of the United States, and that the judicial power of the Honorable court, above-entitled, extends to and embraces this action and its issues, * * * and that the issues herein and in this action set forth involve federal questions under said constitution of the United States and, by reason of the acts and facts and things hereinafter and hereinbefore alleged, the rates hereinafter referred to are unreasonable, unjust, fraudulent, confiscatory, ambiguous, uncertain and unintelligible and if enforced will compel complainant to conduct its said business and operations without fair remuneration, and as to certain portions of said business and operations and supply of water, without any remuneration or compensation; and that said rates and said ordinance are violative of, and prohibited by, each and all of the

said provisions of said constitution of the United States, and by reason of and under said provisions are void and null; and that under said ordinance complainant would, and will, be compelled to furnish water to said city and county and its inhabitants at less than the fair, reasonable and just value of the service rendered, and that by the enforcement of said rates and said ordinance complainant would be and will be deprived of property without due process of law, and will be deprived of property without any process of law, in violation of the provisions of the constitution of the United States; and that by such enforcement its property would be and will be taken for public use without just compensation and, in some instances, without any compensation, and that by such enforcement the privileges and immunities of complainant would be and will be abridged and the equal protection of the law denied to it, in violation of the provisions of the constitution of the United States; * * * that the said bill or ordinance, Exhibit 'A', fixes the rates to be charged for supplying water to the said city and county and its inhabitants for said fiscal year 1912-1913, but that the same was adopted without due process of law and not according to the provisions of law and in a manner that deprived and deprives complainant of the equal protection of the law for the reasons hereinbefore and hereinafter stated, and that the rates thereby fixed are wholly illegal and unconstitutional under the said provisions of the constitution of the United States, and are unauthorized, and if enforced will result in depriving complainant of its property without due process of law; * * * that said bill or ordinance, and all proceedings of said board at said meeting on June 24, 1912, in reference thereto, and all of the meetings of said board in reference thereto, were and are contrary to and violative of said provisions of the constitution of the United States and void thereunder, and that therefore said ordinance will, if enforced, deprive com-

> plainant of its property without due process of law, and abridge the privileges and immunities of complainant, and deny to it the equal protection of the laws; * * * that said bill or ordinance is, and the rates purported to be fixed thereby are, wholly void, null, unjust, unreasonable, fraudulent and unconstitutional under the said provisions of the constitution of the United States, and oppressive and confiscatory and ambiguous, uncertain and unintelligible, and that the said rates do not permit of, or provide for, a just or fair or reasonable compensation for water to be supplied during said year by complainant, or any other person, to said city and county and its inhabitants, and that if said bill or ordinance is enforced complainant's gross income for said fiscal year, after deducting operating expenses and taxes, a proper charge for depreciation and obsolescence, and a proper charge for replacement of portions of complainant's plant which may be destroyed by extraordinary casualty, will be insufficient to pay any dividend whatever during said fiscal year to the stockholders of complainant in excess of two per cent upon the value of the property of complainant necessary to be used in supplying water to said city and county and its inhabitants."

That the matter in dispute, exclusive of interest and costs, exceeds the sum of five thousand dollars; that complainant has no plain, speedy and adequate remedy at law. The prayer of the bill is that the said ordinance be decreed to be null and void and of no effect, that temporary and permanent injunctions issue, and that other incidental relief be granted.

It was upon this showing that the district court took jurisdiction and made the order now appealed from. As we have said, the only question with which the court on

this appeal is concerned is as to whether or not that jurisdiction was properly assumed; and if this court reaches the conclusion that a federal question is involved when a California municipality, through its board of supervisors, enacts a confiscatory ordinance, the order of the lower court must be affirmed. The question is one of jurisdiction, and jurisdiction alone.

JURISDICTION OF FEDERAL COURTS.

The constitution of the United States, article III, section 1, provides:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish."

Section 2 of the same article is as follows:

> "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority."

Article VI provides:

> "This constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

It is provided in article XIV of the amendments, section 1:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citi-

> zens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5 of the same article contains a grant by which Congress is given power "to enforce by appro-
" priate legislation, the provisions of this article".

Under the authority of the constitution, Congress passed the Judiciary Act which provided:

> "that the Circuit Courts of the United States shall have original cognizance concurrent with the courts of the several states, of all suits of a civil nature at common law, or in equity, where the amount in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States or treaties made, or which shall be made, under their authority."

It is provided in the Judiciary Act which became effective January 1, 1912, as follows:

> "Wherever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts." (Section 291.)

The district court has jurisdiction, therefore, in any case arising under the constitution of the United States. In a long line of cases it is held that where a complainant invokes the protection of the constitution of the United States,—that is to say, asserts in good

faith that a right secured to him by that constitution is violated, and asks relief against such violation,—federal courts have jurisdiction to determine the validity of this claim, regardless, of course, as to whether or not the relief sought is ultimately granted. It is the case as made by the pleadings then, and not by the proof, which determines the question.

Mr. Justice Peckham thus stated the rule in

North American Cold Storage Co. v. Chicago, 211 U. S. 305; 53 L. Ed. 198:

"The circuit court held that * * * under no possible construction of that ordinance could the defendants claim the right to the entire stoppage of the business of the complainant in storing admittedly wholesome articles of food, so that it would seem that these acts were mere trespasses, and plainly without the sanction of the ordinance; as to these acts, therefore, the remedy was to be pursued in the state courts, there being no constitutional question involved necessary to give the court jurisdiction. * * *

"The demurrer was therefore sustained and the bill dismissed, as stated by the court, for want of jurisdiction.

"We think there was jurisdiction, and that it was error for the court to dismiss the bill on that ground. The court seems to have proceeded upon the theory that, as the complainant's assertion of jurisdiction was based upon an alleged federal question which was not well founded, there was no jurisdiction. In this we think that the court erred. The bill contained a plain averment that the ordinance in question violated the 14th Amendment, because it provided for no notice to the complainant or opportunity for a hearing before the seizure and destruction of the food. A constitutional question was thus presented to the court, over which it had

> jurisdiction, and it was bound to decide the same on its merits. If a question of jurisdiction alone were involved, the decree of dismissal would have to be reversed."

We also cite

Nashville etc. Ry. Co. v. Taylor, 86 Fed. 168.

Conceding, then, as we must, that, if complainant asks for the protection of a right which it asserts is secured by the federal constitution, it is entitled to have the validity of the right determined by the federal courts, we must further admit that the nature of the question, as long as it arises under the constitution of the United States, has no effect upon the application of the rule. Whether complainant's right and its protection depend upon the construction of an ordinance or the determination of a question of fact only, the principle is the same and the court must take jurisdiction.

As was said in

Hastings v. Ames, 68 Fed. 726, 728,

in an opinion delivered by the Circuit Court of Appeals, Eighth Circuit:

> "It is manifest, therefore, that the suits at bar are cases in which it was claimed that a law of a state contravenes the constitution of the United States. The relief prayed for by the plaintiffs was predicated on the express ground that the statute which the appellants were about to enforce was in violation of the federal constitution, and the relief sought was granted by the circuit court on that ground and for no other reason. The cases accordingly fall within the purview of the sixth subdivision of section 5 of the act of March 3, 1891 (26 Stat. 826, c. 517), which declares that appeals

may be taken to the supreme court in the following cases: '(6) In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.' In opposition to this view it has been suggested that the question which arises on these appeals is simply whether the rates prescribed by the Nebraska statute are unreasonable and unjust, and that this is not a constitutional question, but an ordinary issue of fact. It is true, no doubt, that the issue is one of fact; but a finding is required upon that issue solely for the purpose of deciding the ultimate question, which arises in the several suits, whether the state statute prescribing the rates is constitutional or otherwise. When the validity of a statute is challenged on the ground that it violates the organic law, it is ordinarily the case that the question can be determined by a simple inspection of the statute; but it may happen, as in the present case, that it can only be determined in the light of extrinsic facts which serve to demonstrate the necessary effect, and operation of the statute. Now, it matters not, as we think, how a decision in such cases is to be reached, whether it be by a simple comparison of the statute with those limitations upon legislative power which are imposed by the constitution, or by an investigation and decision of a preliminary issue of fact.''

The foregoing decision was approved in

Ex Parte Young, 209 U. S. 126; 52 L. Ed. 714, 722,

in the following language:

''Jurisdiction is given to the circuit court in suits involving the requisite amount, arising under the constitution or laws of the United States (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508), and the question really to be determined under this objection is whether the acts of the

> legislature and the orders of the railroad commission, if enforced, would take property without due process of law; and although that question might incidentally involve a question of fact, its solution, nevertheless, is one which raises a federal question. See Hastings v. Ames (C. C. App. 8th C.), 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 726. The sufficiency of rates with reference to the federal constitution is a judicial question, and one over which federal courts have jurisdiction by reason of its federal nature."

The following cases are to the same effect:

Perkins v. Northern Pacific Ry. Co., 155 Fed. 445;

Capital City Gas Co. v. Des Moines, 72 Fed. 822.

In the very nature of things such must be the rule. Were it not so, and were it true that, in a case involving the determination of a federal question where the only disputed points are as to the existence of the facts alleged in the complaint, complainant could not resort to the federal court and invoke its jurisdiction in the first instance, he would be deprived of a protection guaranteed by the supreme law of the land. Not only would the decision of the state court be successfully pleaded as a bar to a subsequent action in the federal court, but in the action first instituted in the state court, a writ of error to the Supreme Court of the United States would only secure a review of the law, and would not change the state court's findings of fact. A different rule from that set out above would, therefore, violate one of the fundamental reasons for the establishment and continued existence of the federal

courts. The rule itself, and the reason for it, are forcibly expressed in

Prentiss v. Atlantic Coast Line Co., 211 U. S. 210, 228,

from which we quote:

> "If the railroads were required to take no active steps until they could bring a writ of error from this court to the supreme court of appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two,—pure matters of fact. When those are settled the law is tolerably plain. *All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing, if otherwise competent.*"

In such cases the jurisdiction is, of course, concurrent and not exclusive. A litigant may choose the forum in which he desires to have his rights determined, but when the federal court once takes jurisdiction it then becomes exclusive and cannot be impaired by the action of any state court. The rule is thus expressed by Mr. Chief Justice Waite:

> "The original cognizance here is 'concurrent with the courts of the several states, for the presumption is, and justly so, that the courts of the states will do what the constitution and laws of the United States require.' "

St. Louis Railway Co. v. Southern Express Co., 108 U. S. 24.

The following cases announce and follow the same rule:

Willcox v. Consolidated Gas Co., 212 U. S. 19;
Ex Parte Young, 209 U. S. 160;
Smyth v. Ames, 169 U. S. 466;
City of New Orleans v. Benjamin, 153 U. S. 24;
Nashville etc. Ry. Co. v. Taylor, 86 Fed. 168.

No question of comity in the assumption of this jurisdiction is, of course, involved. If a case is presented which involves a federal question, and the jurisdiction of the federal court is invoked, it is the unquestioned duty of that court to assume the jurisdiction.

As was said by Mr. Chief Justice Marshall, in

Cohen v. Virginia, 6 Wheat. 404,

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should * * * We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."

In cases, then, in which the complainant states a cause of action substantially, and not colorably only, involving a right secured by the constitution of the United States, whether the determination of that right involves a question of fact or a question of law, the courts of the state and of the United States have concurrent jurisdiction; and the litigant has the choice of the forum to which he will go for protection. Neither has exclusive power; neither may reject jurisdiction when its assistance is sought; while neither may, by

its action after the moving party has made his choice, impair the power of the other tribunal to decide the issues submitted to it for determination.

WHERE THE REGULATION OF RATES IS CLAIMED TO VIOLATE THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION, HAVE THE FEDERAL COURTS JURISDICTION?

It is conceded by counsel for appellants that, under certain circumstances, the federal courts have jurisdiction to determine the validity of rates established by state legislatures, municipal corporations, commissions and other agencies of the state. The large number of cases prosecuted to, and determined by, the Supreme Court of the United States in which the question has been considered and passed upon would furnish a complete answer to a contrary contention if such were advanced. Appellants argue, however, that the present case does not come within the category. We shall see in a moment upon what they rest this argument, but before coming to that let us state the principles upon which the jurisdiction has been rested.

The fourteenth amendment to the constitution of the United States is in the following language:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws."

Since the passage of this amendment, its protection has most frequently been invoked by public service corporations against the enforcement of ordinances fixing the rates they may charge for the service rendered by them, upon the ground that those rates, if enforced, will violate the security afforded by that provision. Aside from the necessity that the amount involved shall be in excess of $2000, there are two requirements, and two only, with which a complainant must comply before he can rightfully bring his action in a federal court. He must show (1) that the rate established will, if enforced, abridge his privileges or immunities as a citizen of the United States, or that he is, by the passage of the ordinance fixing rates, deprived of his property without due process of law or denied the equal protection of the law. (2) He must, in the second instance, show that the action complained of, that is, the passage and enforcement of the rate, is action by the state. With the pleading satisfactorily setting forth these facts, one who considers himself wronged may resort for redress either to the state or federal courts, and the tribunal of his choice must hear his claim and determine its validity. This is only, of course, the application of the general rule, heretofore discussed, to the specific instance where the validity of the rate fixed is the issue in the case. The question upon which the ultimate determination may hinge, whether it be a question of law or of fact, has no effect upon the

right and duty of the federal court to act. The jurisdiction must be assumed if a substantial claim is made that the rate, if enforced, will violate the right guaranteed by the federal constitution, and that the state is seeking to enforce the rate. This proposition is fundamental and requires no citation of authority. It, and it alone, supplies the warrant for action by the federal court in every case where it has assumed jurisdiction in cases involving rate regulation.

In the case at bar it is conceded that facts were pleaded and proved sufficient to show that complainant would, if the ordinance referred to in the complaint were enforced, be deprived of its property without due process of law; that the rates fixed were unreasonable and confiscatory and would afford to complainant neither a fair return for the service rendered, nor a reasonable rate based upon the value of its property devoted to supplying the City and County of San Francisco with water. Appellants do not, however, concede that the action of the board of supervisors in passing that ordinance was state action, if, in fact, the ordinance was confiscatory, but, on the contrary, insist that in that event it was not action by the state. The sole question in the case is thus directly presented: Was the action of the board of supervisors of the City and County of San Francisco, in passing the ordinance of June 24, 1912, action by the State of California? It is to a consideration of this question that we now proceed.

THE PASSAGE OF THE ORDINANCE WAS STATE ACTION.

Appellants' argument that the passage of the bill prescribing rates which appellee might charge for water during the fiscal year 1912-13 was not state action is twofold. The two contentions are substantially these: (1) The Supreme Court of California has decided that the City and County of San Francisco, through its supervisors, has the power to fix rates to be charged by complainant, but that the only rates which it can pass *and enforce* are reasonable and just rates. Since it is alleged in the complaint that the rates under discussion in the case at bar are unreasonable and unjust, complainant shows on the face of its pleading that the act complained of was not enforceable by the state and was, therefore, not state action. (2) The constitution of the State of California contains a provision which prevents, in language similar to that employed in the federal constitution, the taking of property without due process and the taking of private property for public use without just compensation. This provision, being a part of the organic law of the state, must be read into the provision granting to the municipal authorities the power to fix rates. The power granted, it is then asserted, being one to fix rates, is still one only sufficiently broad to warrant the fixing of such rates as will not deprive complainant of its property without due process of law, or infringe any other of its constitutional guaranties.

The two grounds, thus assigned, in support of the contention that we have not shown in our pleading that

the state has acted are so closely interwoven that they cannot, to advantage, be treated separately. They may, we think, be accurately stated thus: The municipality has only been given power to enact rates which are reasonable, just and not confiscatory. Complainant pleaded that the rates passed were unreasonable, unjust and confiscatory, and, therefore, is not complaining of state action, and the federal court is consequently without jurisdiction.

The argument predicated by counsel upon those decisions rendered by the Supreme Court of California, referred to by him, is that the constitution of the state, because of those decisions, must now be treated as containing a provision that rates shall be reasonable and just. The rendition of those decisions, is, we feel sure he will concede, not important; it is the fact, that the constitution contains a provision prohibiting the taking of property without due process of law, and therefore, by implication, the rule that rates fixed by a municipality must be reasonable, that furnishes the basis of his argument. Those cases are merely decisions of the courts of this state interpreting the supreme law of the land. They neither, of themselves, add to or detract from the provisions of the constitution, but hold, as they were bound to hold, that by fixing unreasonable and unjust rates the municipality "exceeds the powers conferred upon it", and that the rates so fixed are not enforceable.

We shall, therefore, consider the second branch of counsel's argument and assume that if we can show that to be unsubstantial, the first is likewise invalid.

The question then, which we propose to discuss is the question whether the fixing by a municipality of rates to be charged by a water company, ceases to be state action where the rates fixed are confiscatory, even though it is admitted that the laws of the state expressly confer upon the municipality the general power to fix the rates which such a company may charge.

WHAT IS STATE ACTION?

The answer to this question decides the issues raised in the case at bar.

It is conceded that a state may act through any agency to which it sees fit to delegate its power,—legislative, executive and judicial. The problem is not, then, as to the power to delegate, but as to what actions of the agency to which the power is delegated are actions by the state in contemplation of law. To state first, the converse of the rule for which we are about to contend, we concede that the state has not acted when individuals, even though they may be state officials, violate property rights, where there is no law of the state which even purports to confer upon them the authority to so act. Redress in such cases must be had in the courts of the state.

This rule is clearly illustrated by the following cases:

Memphis v. Cumberland Tel. & Tel. Co., 218 U. S. p. 624;

Owensboro Water Works v. Owensboro, 200 U. S. 38;

Hamilton Gas Light Co. v. City of Hamilton, 146 U. S. 258;

Louisville Railway Co. v. Cumberland Tel. & Tel. Co., 155 Fed. 725;

Barney v. New York, 193 U. S. 430.

The very large proportion of those cases in which litigants were forced to seek their remedy in the state courts were those in which municipal ordinances were attacked on the ground that they were wholly unauthorized by the state, the legislative body of the municipality having no power under the state law to pass any ordinance whatever of the kind in question. If there was this lack of power, there was not state action and no federal question was presented.

In the Memphis case it was, for instance, alleged that the municipality had not been given power to pass the ordinance complained of either

> "by express terms or necessary implication * * * and that the attempt to do so * * * was an attempt to exercise a power which the city wholly lacked".

In the Hamilton case it was alleged that there was no statute of Ohio authorizing the construction by the municipality of the gas works, the establishment of which was complained of, but the court's jurisdiction was sustained because it appeared that the defendant

> "grounded its right to enact the ordinance in question, and to maintain and erect gas works of its own upon that section of the municipal code of Ohio."

So, in the Barney case, the complaint stated that the Board of Rapid Transit Railroad Commissioners did not have under the state law any authority whatever to construct the particular subway in question. In discussing the bill it was said that the complaint

> "on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislature and, hence, was not action by the State of New York within the intent and meaning of the fourteenth amendment, and the circuit court was right in dismissing it for want of jurisdiction."

It was further said that

> "controversies over violations of the laws of New York are controversies to be dealt with by the courts of the state. Plaintiff's grievance was that the law of the state had been broken, and not a grievance inflicted by the action of the legislative or executive or judicial department of the state; and the principle is that it is for the state courts to remedy acts of state officers done without authority, or contrary to, said laws".

It may be taken to be the rule, then, that the action of officers or subordinate bodies of a state, wholly outside of color of authority in law, is not state action. When, however, there is authority in an officer or subordinate body to perform a certain act, such as, for instance, fixing rates, and when an act of the character authorized is performed by that officer or body, but in such a manner as to amount to a taking of property without due process, has the state acted? In other words, has a state acted when an agency, to whom is given power to fix rates, fixes rates which are unrea-

sonable and confiscatory, and which, if enforced, will deprive a citizen of his property without due process of law?

The answer to this question, we believe, is found in express decisions of the federal courts squarely in point.

We shall consider first, those cases in which the question has been either directly or indirectly adjudicated by the Supreme Court of the United States, and then turn to some of the other federal decisions.

In

North American Cold Storage Co. v. Chicago,
211 U. S. 305, 53 L. Ed. 195,

the jurisdiction of the court was invoked on the ground that a municipal ordinance providing for the seizure and destruction of food in cold storage, when unfit for human consumption, violated the fourteenth amendment to the constitution. It does not appear what power of the state was delegated, but the constitution of Illinois contained a provision with regard to "due process" practically the same as that of California.

Mr. Justice Peckham, in delivering the opinion of the court, said, as follows:

> "In this case the ordinance in question is to be regarded as in effect a statute of the state, adopted under a power granted it by the state legislature, and hence it is an act of the state within the 14th amendment. New Orleans Water Works Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18, 31, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741."
>
> * * * * * *

The circuit court held that

> "under no possible construction of that ordinance could the defendants claim the right to the entire stoppage of the business of the complainant in storing admittedly wholesome articles of food, so that it would seem that these acts were mere trespasses, and plainly without the sanction of the ordinance; as to these acts, therefore, the remedy was to be pursued in the state courts, there being no constitutional question involved necessary to give the court jurisdiction.
>
> * * * * * *
>
> "The demurrer was therefore sustained and the bill dismissed, as stated by the court, for want of jurisdiction.
>
> "We think there was jurisdiction, and that it was error for the court to dismiss the bill on that ground. The court seems to have proceeded upon the theory that, as the complainant's assertion of jurisdiction was based upon an alleged federal question which was not well founded, there was no jurisdiction. In this we think that the court erred. The bill contained a plain averment that the ordinance in question violated the 14th amendment, because it provided for no notice to the complainant or opportunity for a hearing before the seizure and destruction of the food. A constitutional question was thus presented to the court, over which it had jurisdiction, and it was bound to decide the same on its merits. If a question of jurisdiction alone were involved, the decree of dismissal would have to be reversed."

In

> *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 52 L. Ed. 78,

the facts were these:

The constitution of Illinois had created a board of equalization, which was, in terms, required to carry out the provisions of the state constitution, to the effect that "every person shall pay a tax in proportion to the value "of his, her, or its property". Proceedings were brought in the federal court by certain railroads, to enjoin the collection of taxes alleged to have been improperly equalized. The bill alleged that by the improper equalization complainants' rights under the fourteenth amendment were violated. It was claimed that no federal question was presented, because the action of the state board was contrary to the constitution and the laws of Illinois, and it would be presumed that the state courts would afford adequate relief, and the dismissal of the action was sought, as it is here sought, upon the authority of cases like

Barney v. New York, supra,

and

Hamilton Gaslight Co. v. Hamilton, supra.

Mr. Justice Peckham, in delivering the opinion of the court, upheld its jurisdiction, and affirmed the judgment of the trial court. We quote from his opinion, as follows:

> "Acting under the constitution and laws of the state, the board therefore represents the state, and its action is the action of the state. The provisions of the 14th Amendment are not confined to the action of the state through its legislative, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever by virtue of public position under a state

> government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition, and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state." * * *
>
> "The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the constitution of the state in levying a tax by valuation, 'so that every person shall pay a tax in proportion to the value of his, her or its property', was, in this instance, omitted and ignored, while the board was making an assessment which it had jurisdiction to make under the laws of the state. This action resulted in an illegal discrimination which, under these facts, was the action of the state through the board. Barney v. New York, 193 U. S. 430, holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the state. Such is not the case here."

The dissenting opinion of Mr. Justice Holmes shows that the question here presented was squarely passed upon and determined. We quote from it, as follows:

> "It seems to me that the appellee should not be heard until it has exhausted its local remedies; that the action of the state board of equalization should not be held to be the action of the state until, at least, it has been sanctioned directly, in a proceeding which the appellee is entitled to bring, by the final tribunal of the state, the supreme court. I am unable to grasp the principle on which the state is said to deprive the appellee of its property without due process of law because a subordinate board, subject to the control of the supreme court of the state, is said to have violated the express requirement of the state in its constitution,—because, in other words, the board has disobeyed the

> authentic command of the state by failing to make its valuations in such a way that every person shall pay a tax in proportion to the value of his property. I should have thought that the action of the state was to be found in its constitution, and that no fault could be found with that until the authorized interpreter of that constitution, the supreme court, had said that it sanctioned the alleged wrong. Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502."

In

Michigan Central Railroad Co. v. Powers, 201 U. S. 245, 50 L. Ed. 744,

the court was called upon to consider the validity of a certain act, which provided for the assessment of the property of a railroad, and certain other companies, for the levying of taxes thereon by a state board of supervisors, and for the collection of such taxes.

We quote from the opinion of Mr. Justice Brewer, as follows:

> "The unconstitutionality of a statute may depend upon its conflict with the constitution of the state or with that of the United States. If conflict with the state constitution is the sole ground of attack, the Supreme Court of the state is the final authority (Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829, and cases cited in the opinion); while, in the other case, the ultimate decision rests with this court. The validity of this act has not been directly presented to or determined by the state court, but the first attack by the parties interested is made in the federal court and by this suit and conflict with both constitutions is alleged. Undoubtedly, a federal court has the jurisdiction, and, when the question is properly presented, it may often become its duty,

> to pass upon an alleged conflict between a statute and the state constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the state or of the federal constitution, may be presented in a single suit, and call for consideration and determination."
>
> *City of Cleveland v. Cleveland City Ry. Co.,* 194 U. S. 516, 48 L. Ed. 1102,

was an action in which it was alleged in the bill that a certain ordinance passed by the City of Cleveland impaired the obligation of a certain contract formerly entered into between complainant and the city. From the opinion of Mr. Justice White, we quote as follows:

> "The statutes show that there was lodged by the legislature * * * of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed.
>
> "That in passing ordinances based upon the grant of power referred to, the municipal council of Cleveland was exercising a portion of the authority of the state, as an agency of the state, cannot in reason be disputed. If, therefore, the ordinances passed after August, 1879, and referred to previously, which ordinances were accepted by the predecessors of the complainant, with whom it is in privity, constituted contracts in respect to the rates of fare to be thereafter charged upon the consolidated and extended lines (affected by the ordinances) as an entirety, it necessarily follows that the ordinance of October, 1898, impaired these contracts."

The Ohio constitution contains the same provision regarding "due process" as does that of California.

From

Barney v. City of New York, 193 U. S. 430, 48 L. Ed. 737,

the so-called New York Subway case, the opinion in which was written by Mr. Chief Justice Fuller, we quote as follows:

> "And so in *Reagan v. Farmers' Loan & T. Co.,* 154 U. S. 362, 38 L. Ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, the general assembly of Texas had established a railroad commission and given it power to fix reasonable rates, with discretion to determine what rates were reasonable. The act provided that suits might be brought by individuals against the commission 'in a court of competent jurisdiction in Travis County, Texas', and a citizen of another state sued them in the circuit court of the United States for the district which embraced Travis County, and this was held to be authorized by the state statute.
>
> "And as the establishment of rates by the commission was the establishment of rates by the state itself, and the determination of what was reasonable was left to the discretion of the commission, their action could not be regarded as unauthorized, even though they may have exercised the discretion unfairly.
>
> "Similarly in *Pacific Gas Improv. Co. v. Ellert,* 64 Fed. 421, where a public board was given power to improve streets, and proceeded in excess of its powers, but not in violation of them, its action was regarded by Mr. Justice McKenna, then circuit judge, as state action.
>
> "In the present case defendants were proceeding, not only in violation of provisions of the state law, but in opposition to plain prohibitions."

In

Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 683, 42 L. Ed. 630,

Mr. Justice White, in considering the question of jurisdiction, directly raised and argued, said:

"By the 5th section of the act of March 3, 1891, creating the circuit court of appeals (26 Stat. at L. 826, chap. 517), jurisdiction is conferred upon this court to review by direct appeal any final judgment rendered by the circuit court 'in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States'. There can be no doubt that the case at bar comes within this provision. The complainants in their bill in express terms predicated their right to the relief sought upon the averment that certain ordinances adopted by the municipal authorities of the city of Austin, and an act of the legislature of the state of Texas referred to in the bill, impaired the obligations of the contract which the bill alleged had been entered into with the complainants by the city of Austin, and that both the law of the State of Texas and the city ordinances were in contravention of the constitution of the United States. No language could more plainly bring a case within the letter of a statute than do these allegations of the bill bring this case within the law of 1891.

"Not only were the averments of the bill as to the invalidity of the state law adequate, but so also were the allegations as to the nullity of the city ordinances. These ordinances were but the exercise by the city of a legislative power *which it assumed had been delegated to it by the state,* and were, therefore, *in legal intendment the equivalent of laws enacted by the state itself.* City Railroad Co. v. Citizens' Street Railway Co., 166 U. S. 557 [41:1114], and cases there cited."

City Street Ry. Co. v. Citizens' Street R. Co., 166 U. S. 561, 41 L. Ed. 1116.

The action had here been brought upon the ground that defendant had attempted, by the passage of a municipal ordinance, to impair the obligation of a contract entered into with complainant by it. In the lower court, the point now so strenuously urged was directly raised and considered. It was there said:

> "It is contended that the constitutional guaranty which prohibits a state from passing any law impairing the obligation of contracts must be read into the state statute, and, thus read, the statute would not confer any authority on the city to make the contract and enact the ordinance in question, and, therefore, no federal question would be involved. If such concession were granted, it is argued that no law of the state, however clearly it might impair the obligation of contracts, would present a federal question, because the bane and antidote would go together. If the constitutional prohibition was read into the state law, the federal question would still remain. The federal question in all such cases is, does the statute of the state, or the grant made by a municipality thereunder, when fairly construed, and treating it as otherwise valid, present a case falling within the prohibition of the constitutional guaranty in question? If the law of the state, or a municipal grant under its authority, is a valid enactment, except for its repugnancy to the provision of the constitution which prohibits a state from passing any law impairing the obligation of contracts, then such repugnancy presents a federal question, and gives this court jurisdiction. Such a case is exhibited by the bill of complaint." (56 Fed. 746.)

When the Supreme Court of the United States was called upon to determine the correctness of the trial

court's ruling, it was affirmed. We quote, as follows, from the opinion of Mr. Justice Brown:

> "1. There can be no doubt that the circuit court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the state of Indiana. It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill, and not upon the facts as they subsequently turned out to be."
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> * * * * * * *
>
> "All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair."
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> * * * * * * *
>
> "That the city did attempt to impair this contract by the agreement of April 24, 1893, with the City Railway Company, and its ordinance ratifying the same, is equally clear. This contract was entered into in pursuance of a supposed right given by the act of the general assembly of March 9, 1891, known as the City Charter, the 59th section of which enacted that 'the board of public works shall have power * * * to authorize and empower by contract telephone, telegraph, electric light, gas, water, steam, or street car, or railroad companies to use any street, alley, or other public place in such city; * * * provided, that such contract shall, in all cases, be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect.' This contract and ordinance of April 24, 1893, even if otherwise valid, could not be construed to interfere with the rights of the complainant to occupy the streets of the city under the act of 1861, and the ordinance of January 18, 1864, without coming in conflict with that provision of the constitution which forbids states from enacting laws impairing the obligation of contracts. Whether the state had or had not impaired the obligation of this contract was not a question which

could be properly passed upon, on a motion to dismiss, so long as the complaint claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one."

We next cite

Murray v. Charleston, 96 U. S. Supreme Ct. Reps. 432, 24 L. Ed. 760.

In determining the validity of a municipal ordinance, directing that a tax assessed by a municipality on its stock should be retained by its treasurer out of the interest due on it to its holders, Mr. Justice Strong, speaking for the court, said:

"It was not until the ordinances were passed, *under the supposed authority of the legislative Act,* that their provisions became the law of the state. It was only when the ordinances assessed a tax upon the city debt, and required a part of it to be withheld from the creditors, that it became the law of the state that such a withholding could be made."

The question has been often presented for determination to the other federal courts. We shall refer only to the opinions which seem particularly in point.

In

Louisville v. Cumberland T. & T. Co., 155 Fed. 725,

the Circuit Court of Appeals for the Sixth Circuit, in an opinion delivered by Judge Lurton, said, as follows:

"If this be true, there was no state authority behind the action of the Louisville common council, and no ground to claim that constitutional prohibitions have been violated which are pointed at state aggression only. A municipal ordinance may be the

exercise of a delegated legislative power conferred upon it as one of the political subdivisions of the state; but, to be given the effect and force of a law of the state, it must have been enacted in the exercise of some legislative power conferred by the state in the premises."

* * * * * *

"If the fact be that no provision of the state constitution, or of state law, or of the municipal charter, delegates the state power in respect to the regulation of the charges of telephone companies rendering services within the city of Louisville, the ordinance is void as ultra vires, and its enactment did not violate any prohibition of the constitution of the United States, because not enacted in pursuance of any state authority."

* * * * * *

"The most that can be made of the averments of this bill is that it presents questions arising under the constitution and laws of the state. The remedy in such cases is in the courts of the state. If it shall turn out that the common council *did have general power* to regulate the charges of telephone companies rendering services within the city of Louisville, and that it has illegally exercised that power, either because it has thereby impaired the obligation of a contract, or by imposing rates which are unjust and confiscatory, a federal question may arise. But it is not enough to found jurisdiction upon that such a question may arise when the bill expressly avers that the action of the common council is not imputable to the state by charging that no such power had been delegated by the state."

In

Des Moines City Ry. Co. v. City of Des Moines,
151 Fed. 854,

an action was brought to enjoin a municipal ordinance, which, it was alleged, would deprive complainant of its

property without due process of law. The jurisdiction of the court was attacked upon the same grounds as those here urged. The answer of the court, delivered by Judge McPherson, was as follows:

> "Finally it is urged by counsel for the city that the case can be decided under the Iowa constitution, and therefore there is no federal question. That is the rule as to taking a writ of error to the Supreme Court; but it is not the test as to jurisdiction of this court. The contention of the city is because of article 1, section 21 of the Iowa constitution: 'No law impairing the obligation of a contract shall ever be passed,' and those other provisions much like recitals to be found in the fourteenth amendment. Thirty-two of the states have a similar provision, and yet time and again from those states have cases arisen and been carried through the Supreme Court without a diversity of citizenship, on federal questions from states, wherein were involved the contract clause, and of taking property without due process of law. It must never be forgotten that the constitution of the United States according to its own recitals in article 6 is as follows:
>
> " 'This constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land.' And when it is not so, this government will be at an end, and we will again have a confederation. In most cases wherein the United States circuit courts take jurisdiction such courts and the state courts have concurrent jurisdiction. But if the contention of the defendant's counsel is correct, then in 32 states of this Union United States courts are ousted of jurisdiction by the action of those states, while in the remaining states the jurisdiction remains. The entire error is in assuming that the resolution of November 21, 1905, is ultra vires, instead of saying that it is a repudiation, and an attempted impairment of a contract."

The case was reversed by the Supreme Court, because it appeared that no contract had been impaired; not, however, because of any lack of jurisdiction.

Ozark Bell Telephone Co. v. City of Springfield,
140 Fed. 666,

was an action brought to enjoin the enforcement of an ordinance regulating telephone rates. The point here raised was vigorously urged upon that court, but did not receive its sanction. From the opinion of Judge Marshall, we quote as follows:

> "But it is said that the complainant alleges that the ordinance challenged is in contravention of section 4, art. 2, of the constitution of Missouri, in that it impairs its freedom of contract. It may be admitted that, if the only claim made is that the city has proceeded in a way forbidden by the constitution of the State of Missouri, and for that reason the rights guaranteed by the fourteenth amendment of the constitution of the United States have been infringed, there is no jurisdiction. The whole question would then turn on a construction of the constitution of the state of Missouri, and should be left to the decision of its courts. But the bare averment that the ordinance contravenes the constitution of Missouri states no issuable fact. It is a mere legal conclusion. Nor does the bill present a case of an unlawful interference with its right to contract. The conclusion of the pleader in this respect must be treated as surplusage. The suggestion made on the argument that the state had authorized the city to prescribe reasonable rates, and that, when unreasonable rates were fixed, the action of the city was unauthorized, and cannot be imputed to the state, is answered by the Supreme Court of the United States in Barney v. City of New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. ed. 737, in which case, in discussing Reagan v. Farmers' Loan &

Trust Company, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014, it is said, at page 440 of 193 U. S., at page 505 of 24 Sup. Ct. and 48 L. ed. 737:

"'And as the establishment of rates by the commission was the establishment of rates by the state itself, and the determination of what was reasonable was left to the discretion of the commission, their action could not be regarded as unauthorized, even though they may have exercised the discretion unfairly.'"

In

Iron Mountain R. Co. of Memphis v. City of Memphis, 96 Fed. 113,

a municipal ordinance, which, it was asserted, violated a constitutional guaranty, was under consideration. Judge Taft, speaking for the Circuit Court of Appeals of the Sixth Circuit, among other things, said:

"Was the resolution a law of the state within the meaning of this clause? It has frequently been decided that, where a municipal council passes an ordinance in pursuance of authority vested in it by the state legislature, which is legislative in its character, and which is merely the exercise of delegated power to make laws that the legislature might have made directly, such an ordinance is a law within the inhibition of the constitution if it impairs the obligation of a contract."

* * * * * *

"The resolution in the case before us is admitted to have been passed with all the forms required, and by the vote necessary to enact an ordinance."

* * * * * *

"In exercising such an option, the council is acting in a legislative capacity. Its declaration is a law."

In

Capital City Gas Co. v. City of Des Moines, 72 Fed. 818,

the same argument was advanced and fully considered. We quote, as follows, from the opinion of Judge Woolson:

> "It is claimed the constitutional prohibitions invoked by plaintiff are as to state action, and that the bill presents no action by the state. The fourteenth amendment to the United States constitution provides, 'No state shall make or enforce any law, * * * nor deny to any person,' etc. The reasoning on this point is substantially this: The state acts through its legislative body. Such body has established no rates for gas. That body did, however, by its statute of 1888, delegate to certain city councils of the state (that of Des Moines being included) the express power to regulate the price of gas within their city limits. But the power to regulate is a power to establish reasonable rates. If the council fix rates which are not reasonable, it is not acting within the power so delegated to it, but has acted beyond and without such delegated power; and, ex necessitate, such action is invalid, because not within the delegated power. Therefore, the argument proceeds, all that is required is to ascertain the reasonableness of the rates; and as that is determined, so is determined whether the council has acted within or beyond the power delegated to it. Thus no federal question under the United States constitution is involved, but the question is simply and only, is the action of the city council within the power thus delegated to it? If the rate is reasonable, yes; if unreasonable, no. This argument has at least plausible force. It deserves close examination.
>
> "Another branch of the same general line of reasoning may be here stated. Assuming that

whatever action the city council may take as to fixing rates is under the delegated authority conferred by the statute of 1888, above referred to, such regulating or fixing price for gas under the statute, is only a power to fix reasonable rates. And if a rate is fixed which is not reasonable, then, as this act of the council is not that contemplated or authorized by the statute, it cannot be said that the rate is fixed by the state. The act is not authorized by the state, and so the state has not deprived plaintiff of property, etc. Therefore, such fixing of rates is not within the constitutional prohibition relating to action by the state.

"The test which shall determine the correctness of this reasoning is not of difficult application. Had the law making power of the state by statute fixed the rates, and such rates were not reasonable, —and by the term 'not reasonable' rate as I am herein using it is meant a rate so low as not to afford a proper and reasonable return, under the circumstances, for service performed, including gas furnished,—if the statute rates were not reasonable, manifestly the law might be decreed invalid, under the doctrine so clearly announced by Justice Brewer in *Ames v. Railway Co.*, 64 Fed. 165."

* * * * * *

"If unreasonable, then the commissioners had gone beyond the power delegated to them, and all that would be required would be to so find, and thereupon, and because of that fact, declare the rates invalid, etc. Yet such was not the method pursued in the Reagan case. There the Supreme Court pursued their inquiry substantially on the lines adopted by the bill in the pending action. In the Reagan opinion the Supreme Court manifestly reason upon the theory that the rates fixed by the commissioners were, according to the provisions of the constitution of the United States, a 'law' of the state, though the commissioners exceeded the power

delegated to them when they fixed the rates which the court in that case declared to be not reasonable, and therefore invalid."

* * * * * *

"The opinion of the Supreme Court rendered in *Hamilton Gaslight & Coke Co. v. Hamilton City,* 146 U. S. 258, 13 Sup. Ct. 90, justifies the assertion that the ordinances of a city, when passed in accordance with the forms of law and under assumed and asserted powers delegated to it, and in a direction wherein such powers might be delegated, is the 'law' of the state, within the meaning of that term, as used in the constitutional provisions."

We have now, with four exceptions, considered the most important of the cases bearing upon the subject. Those exceptions are:

Seattle Elec. Co. v. Seattle S. Ry. Co., 185 Fed. 365;

Pacific Gas & Elec. Co. v. City and County of San Francisco, 189 Fed. 945;

City and County of San Francisco v. United Railroads, 190 Fed. 507;

Home Telephone & Tele. Co. v. City of Los Angeles, C. C. No. 1685.

It is upon three of these that appellants rely; they cite no other authority.

We shall contend that the first three of these decisions directly support the argument we make, and that the fourth is based upon an erroneous construction of the opinion delivered by this court in the Seattle case.

THE SEATTLE CASE.

The material facts of the case are few, and can be briefly stated. The complainant filed a bill in the circuit court, in which it was alleged that it had been granted by the City of Seattle a franchise to operate a street railway in that city, and that the same city had subsequently granted to defendant a franchise to construct and operate a railroad over some of the same streets. It was further alleged that the operation by defendant of its railroad under this franchise would depreciate the value of plaintiff's property; that the later franchise was in violation of the terms of the franchise owned by plaintiff, and had been granted in fraud of its rights; that it was granted illegally and without right by the City of Seattle, and that, by its terms, the property of plaintiff would be taken from it without due process of law, and in contravention of the constitution and the laws of the United States; that the later ordinance was without authority of law, and was null, void, and without force and effect.

An interlocutory decree of injunction was issued by the circuit court, from which an appeal was prosecuted to this court, on the ground that the lower court lacked jurisdiction to make the order. In its consideration of the validity of that contention, this court declared that, in order to give jurisdiction to that court, a federal question must be really and substantially involved. It then pointed out that the claim that a federal question existed in the case at bar was grounded upon an alleged conflict between a municipal ordinance and the fourteenth amendment.

We now quote from the opinion:

> "These provisions (referring to the fourteenth amendment) have reference to state action exclusively, and not to any action of a private individual or corporation. It is the state that is prohibited from abridging the privileges or immunities of citizens of the United States, and from depriving any person of life, liberty, or property without due process of law. The state may act through different agencies, through its legislative, executive, or judicial authority. Virginia v. Rives, 100 U. S. 313, 316, 25 L. Ed. 667; Civil Rights Cases, 109 U. S. 3, 11, 3 Sup. Ct. 18, 27 L. Ed. 835. A municipal corporation may be such an agency. Its power is generally that of a political subdivision of the state created by virtue of the power of the state acting through its legislative department. Worcester v. Street Ry. Co., 196 U. S. 539, 548, 25 Sup. Ct. 327, 49 L. Ed. 591; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 148, 21 Sup. Ct. 575, 45 L. Ed. 788. *A municipal ordinance passed pursuant to the authority of the state* which abridges the privileges or immunities of a citizen or deprives a person of property without due process of law *may be therefore an act of the state prohibited by the constitution. But the ordinance to come within the prohibition of the amendment must, by implication at least, express the will of the state. It must be the act of the state.* City of Louisville v. Cumberland Telephone & Telegraph Co., 155 Fed. 725, 729, 84 C. C. A. 151. With these fundamental principles before us, let us make further inquiries concerning the ordinance involved in this case."

The opinion then declares that the franchise granted to the plaintiff by the first ordinance was not exclusive, and that since the later ordinance required the defendant to make compensation to the holder of the former franchise under the former ordinance for any damage

caused by the location of its tracks, it appeared plainly and distinctly, upon the face of the ordinance, that the later ordinance did not in any sense infringe any of plaintiff's rights, and that, therefore, the claim that the plaintiff had been deprived of its property, without due process of law, was wholly unsubstantial and insufficient to warrant the assumption of jurisdiction by the circuit court.

The opinion unquestionably decided:

1. In order that the circuit court may assume jurisdiction where there is no diversity of citizenship, a federal question, *bona fide* and substantial in character, and not a mere claim of words, must be involved;

2. The protection guaranteed by the fourteenth amendment can only be invoked against state action. The act of a municipality may be state action;

3. For a municipal ordinance to be an act of the state, it must be passed pursuant to some state authority, and must, "by implication at least, express the will " of the state";

4. The claim of the plaintiff, in this case, was colorable only, and altogether unsubstantial, and no action by the state was shown.

The rules thus announced and followed are in full accord with the cases which we have cited, and they seem to us to supply full warrant for the judgment rendered. But the court then proceeded as follows:

> "But there is a further and, as we believe, a conclusive objection to the claim of right on the part of the complainant to invoke the jurisdiction

of the circuit court on constitutional grounds. *It seems to us that in no aspect of the grant to the defendant is there a real and substantial dispute or controversy dependent upon the application of provisions of the federal constitution. If it should be conceded that in some view of the ordinance and defendant's action under color of its provisions there would be a taking of complainant's property without due process of law, still it would not follow that the circuit court had jurisdiction of the case unless the ordinance in that aspect would be the supreme law of the state. The supreme law of the state is the constitution of the state; and that document provides in Article 1, Section 3, as does the fourteenth amendment to the constitution of the United States, that 'No persons shall be deprived of life, liberty or property without due process of law.'*

"Under this provision of the state constitution the ordinance would be as invalid as under the federal constitution. It would be with respect to the former as the complainant charges in its complaint with respect to the latter, 'without authority in law, null and void, and of no force and effect.' The presumption is that the courts of Washington will not deny to any of its citizens or corporations the equal protection of its constitution. If, however, it should turn out that we are mistaken in this respect the complainant will have his remedy in an appeal from the highest court of the state to the Supreme Court of the United States. 'The doctrine here is that the aggrieved party must first invoke the aid of the state courts, since it is for the state courts to remedy the acts of state officers done without authority of, or contrary to, state laws. In such a case the complaining party must exhaust his remedy in the state courts by prosecuting his case in the state court of last resort for cases of that character; and until he has done this, it cannot be said that he has been denied due process or deprived of his property by state action. If the decision of the

highest state court to which he can resort is adverse to him, he can then take his case on writ of error to the United States Supreme Court upon the ground, not that the proceeding or action complained of was contrary to or unauthorized by state law, but upon the ground that what was complained of as a deprivation of life, liberty or property without due process of law in violation of the fourteenth amendment has at last received the sanction of the state and, in effect, become the act of the state itself.' 5 Ency. U. S. Sup. Ct. Rep. page 545.

"This was substantially the question before the Supreme Court of the United States in Hamilton Gas Light Co. v. Hamilton City, supra, where the court said:

" 'The jurisdiction of that court (Circuit Court of the United States) can be sustained only upon the theory that the suit is one arising under the constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff sought protection against the violation of the alleged contract by an ordinance to which the state has not in any form, given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts.'

"See also Barney v. City of New York, 193 U. S. 430.

"It follows from these considerations that the circuit court has no jurisdiction of the case.

"The judgment is therefore reversed with instructions to dismiss the bill of complaint."

In this portion of the opinion, the court said that even if it should be conceded that, in some view of the ordinance and defendant's action under color of its

provisions, there would be a taking of complainant's property without due process of law, it still would not follow that the circuit court had jurisdiction of the case unless the ordinance in that aspect would be the supreme law of the state; that "the supreme law of the "state is the constitution of the state," and that the constitution of the State of Washington itself prohibited any deprivation of property without due process of law; that the ordinance was, therefore, not only unauthorized, but was also prohibited by state law, and that the complainant, having its remedy in the state court, must exhaust that remedy before the state could be said to have acted; that until the highest court of the state enforced the ordinance it would not have received the sanction of the state, and would not be state action.

It seems to us that this portion of the opinion, which has been the subject of so much comment, is sufficiently explained by applying it to an ordinance passed *without and not under color* of state authority. Of course, such an ordinance is not state action until it receives the judicial sanction of the highest state tribunal. This interpretation of the opinion is substantiated by an examination of the authorities cited by the court itself. The only citations are the following:

5 Encyclopedia U. S. Supreme Ct. Reps., 545;
Hamilton Gaslight Co. v. Hamilton City, 148 U. S. 258;
Barney v. New York, 193 U. S. 430.

The quotation from the Encyclopedia refers only to cases in which not only is there lacking in the state

law any authority for the act of the state agency, but in which such act is by the state law expressly prohibited. The following language, which immediately precedes that quoted by the court, makes this clear:

> "When a subordinate officer or agency of the state in violation of the state law undertakes to do that which is not only unauthorized but which is forbidden by the state law, such action cannot be said to be action by the state within the intent and meaning of the fourteenth amendment. In such cases the grievance is simply that the state law has been broken, and not that the state has inflicted a wrong through its legislative, executive or judicial department."

All the cases cited in the Encyclopedia in support of this principle are cases where either the right violated was not one secured by the federal constitution, or where the action complained of was not only unauthorized, but forbidden by state law. The Hamilton and Barney cases we have already considered and found to be of the latter description.

It seems to us, therefore, that the latter portion of the opinion in the Seattle case was only addressed to a situation in which relief was sought against action not that of the state. If that is so, it is, of course, not authority against our contention in this case. If, on the other hand, it is to be construed as holding that although a municipality acts under color of, or pursuant to, authority granted to it by the constitution of the state, its act may still not be that of the state, we submit that the decisions already referred to by us plainly show that the rule so announced is not the true rule.

PACIFIC GAS AND ELECTRIC CASE.

Counsel for appellants has said that the opinion rendered by the district court in this case "is as forci- "ble a presentation as can be made in favor of the "jurisdiction of federal courts in rate cases." We can only add that it, to our minds, so clearly distinguishes the Seattle case from cases of the impression of the one at bar, adheres so closely to the time-honored rules of constitutional law, as we understand them, that it seems to render practically unnecessary the argument we have felt called upon to make. We quote, as follows, from the more important portion of that opinion, which was delivered by Judge Van Fleet:

> "That there is some general language in that opinion which, when separated from its context and dissociated from its facts, lends color to the construction put upon it by respondents, cannot be denied, language which has induced a similar view, not only by able counsel seeking, through a petition for rehearing, its modification, but by leading law journals. 23 Green Bag, p. 153; 4 Lawyer and Banker, p. 132."
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> "These authorities, to my mind, fully sustain the views of this court as expressed at the argument: * * * that, where a state has conferred power upon some one of its agencies to perform a certain function involving the exercise of discretionary power, the performance of such function within that grant, although in a manner to render it obnoxious to the laws of the state, is none the less the act of the state within the contemplation of the constitutional guaranty here invoked; that such an instance is in all material respects analogous to the one where a state has conferred certain

> jurisdiction upon its courts, where acting within the limits of that jurisdiction no one may question that the decision of a state court is to be regarded as much the act of the state, whose majesty it represents, when it decides wrong, as when it decides right, since it is still, in either event, acting under the cloak of state authority."
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> * * * * * *
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> "It will thus be seen that that case simply holds that an ordinance will not be regarded as state action if it be 'an ordinance to which the state has not *in any form* given *or attempted to give* the force of law.' That as we have seen is not this case."

Counsel's only criticism of the rule thus announced is, in effect, to say that he does not agree with it, and to dispute the effectiveness of the authorities referred to in it. To our minds, the reasoning of the opinion, and the cases cited in its support, are unassailable where the general power to fix rates is given.

THE UNITED RAILROADS CASE.

Counsel concedes that there was not in this case "state action." Facts were alleged in the bill, which showed that the action of the municipality was, at most, a violation of the city's contract, and of the express paramount law of the state, and that the ordinance was not passed pursuant to any state authority. It necessarily follows, therefore, that there was no action by the state sufficient to sustain federal jurisdiction on the ground that the ordinance was violative of the constitutional provision prohibiting the state from passing any law impairing the obligation of contracts.

We quote, as follows, from the opinion:

"The inquiry is whether on the facts alleged in the bill there has been state action impairing the obligation of the contract.

"(1) A state may act through a municipal corporation to which it has delegated powers of legislation, but where the ordinance of such a corporation is relied upon as constituting the impairment, it must be shown to have been enacted pursuant to the legislative authority of the state. Otherwise it is not state action.

"(2) If, as alleged in the bill, the impairment of the appellee's contract consists in the fact that the city is proceeding to disregard its covenant, and to construct a road in violation of the provisions of section 499, which was made a part of the contract, we are confronted with the fact that the city is proceeding to violate a law of the state. If its action is illegal and unwarranted, it is primarily so because it violates that law. If its action has the effect to impair the obligation of the contract, it also has the effect to violate the express and paramount law of the state, and it is, therefore, void, and is not state legislation.

"* * * In line with these authorities is the decision of this court in Seattle Electric Co. v. Seattle R. & S. Ry. Co., 185 Fed. 365, 107 C. C. A. 421. In that case the ordinance which was complained of and which it was said would operate to deprive the complainant of its property without due process of law was alleged in the bill to have been granted illegally, and without right and to be 'without authority in law, and null and void and of no force and effect.' We held, following the cases above cited, that, taking those averments to be true, the ordinance complained of was not the act of the state, and that there was no federal question involved. When it comes to the question whether the ordinance of a municipality is or is not legislation by the state, there can be no dif-

ference between an ordinance which has been enacted ultra vires and an ordinance which has been enacted in violation of a general statute of the state which prohibits the precise and specific act which is done by the ordinance. In neither case is the ordinance state action, for in both cases it is void under the state law. Whether or not the ordinances complained of here would in fact, if carried out, have the effect to impair the obligation of the appellee's contract, we do not undertake to decide. What we hold is that the averments of the bill itself exclude the case from the cognizance of a federal court as a case arising under the constitution of the United States by alleging that the very ordinances which the appellee relies upon as constituting a violation of its contract have been enacted in violation of the positive law of the state."

In a concurring opinion, Judge Hanford said:

"I concur in the foregoing opinion and all of it with this reservation, that as the decision of this court in the case of Seattle Electric Co. v. Seattle R. & S. Ry. Co., 185 Fed. 365, 107 C. C. A. 421, is cited, I am unwilling to acquiesce in that part of said decision found in the quotation from 5 Ency. U. S. Sup. Ct. Rep. p. 545, asserting that a party complaining of an invasion of rights guaranteed by the constitution of the United States and also in violation of the constitution or laws of the state, 'must exhaust his remedy in the state courts by prosecuting his case to the state court of last resort' before he will be entitled to invoke the jurisdiction of a federal court.

"The federal courts ordained and established pursuant to the constitution of the United States have an important function in adjudicating controversies involving questions of national law, and the jurisdiction of the United States Circuit Courts in actions at law and suits in equity, if not exclusive, is concurrent with, and not secondary to, the

> jurisdiction of state courts. I consider that a United States court has no right to deny its jurisdiction, in a case where jurisdiction is conferred by Congress, merely because of a presumption that the rights of the complainant will be fully protected by a state court, or on a review of its decision by the Supreme Court of the United States."

Counsel refers, with emphasis, to that portion of the decision which says that

> "there can be no difference between an ordinance which has been enacted *ultra vires* and an ordinance which has been enacted in violation of a general statute of the state which prohibits the precise and specific act which is done by the ordinance."

To our mind, this is a correct statement; but we see nothing in it which militates against our position. The rule thus stated is, we believe, precisely the rule in support of which we have at all times in this argument been contending. By *ultra vires* act, in this connection, is meant, we submit, an act by a state agency, not done under color of, or upon an assumption of, or pursuant to, state authority. The act considered by this court, in the above case, was an act of that nature.

THE HOME TELEPHONE CASE.

We shall not discuss the opinion of the district court, rendered in this action. It is confessedly based on the decision of this court, delivered in the Seattle case, and, to our minds, misconstrues and misinterprets the rule there laid down.

In our opinion, then, the cases, with the single exception of the one last mentioned, follow the rule long ago announced by the Supreme Court of the United States, followed by it to the present time, and repeatedly applied in the manner we have suggested, by all other federal courts in which the question has arisen.

Upon the basis of those decisions, we believe this rule to be the following: Where the state has given, or attempted to give, to a legislative act, to be performed by one of its agencies, the force of a law, that act is regarded, in legal contemplation, as having been performed under and pursuant to the power conferred, and is considered the act of the state, notwithstanding its repugnancy to the national or state constitution. If the state has "in any form given, or attempted to give, "the force of law" to an ordinance, if it was passed "under supposed legislative authority"; if the "determination of its reasonableness was left to the discretion" of the agency which enacted it; if the agency acts in excess of its powers, but not in violation of them; if the ordinance is passed "under the power conferred" or under delegated legislative authority; if the ordinance is "a valid enactment except for its repugnancy to the constitution"; if a state has conferred power upon some one of its agencies to perform a certain function involving the exercise of discretion and the function is performed,—in all such cases it has been judicially determined that the state has acted, and that the act performed is state action, within the meaning of the fourteenth amendment.

The principle, in other words, is that where an agency of the state has been given power to act with regard to a certain subject matter, its action with regard to that subject matter is authorized, even though repugnant to the provisions of the state and federal constitutions; it is acting under color of, upon an assumption of, pursuant to, authority granted by the state, and its act is that of the state.

The authorities cited so firmly establish the rule that we are reluctant to carry our argument further. One other observation may, however, properly be made. Appellant's argument is that because a provision similar to that of the fourteenth amendment has been made a part of the California constitution, federal courts are ousted of the jurisdiction they would otherwise have. It is conceded that in states which have no such constitutional provision, federal courts have jurisdiction in just such cases as this, but it is insisted that because that guaranty has become a part of the organic law of the state, the federal courts are for that reason, and for that reason alone, deprived of their former power. It is apparent that this cannot be so. The insertion of the provision under consideration in the California constitution had absolutely no effect upon the law of California. The constitution of the United States is the supreme law of the land; its provisions are explicitly said to be the supreme law of California in our constitution, and the California court must necessarily follow its mandates, regardless of the state law. If the rule is and has been that contended for by counsel, it necessarily follows that even in states where there is no

such constitutional guaranty as that contained in the fourteenth amendment, the federal courts still have no jurisdiction, because, *under the state law,* into which the federal constitution must be read, the act complained of is prohibited. But that that is not the law is, of course, fully sustained by a long line of authorities in which that jurisdiction has been upheld.

On counsel's theory we should have two situations in two different states, in all respects the same, yet in one the federal courts would have, and in the other they would not have, jurisdiction. The explanation is that counsel's rule is not the true rule, and that he has failed to appreciate what state action, within the meaning of the fourteenth amendment, is. It is not action by the state which is legally unassailable, nor is it only action which has had the approval of the highest court of the state. It is not the former, because, if it were, a federal court would in each case have to determine the constitutional question against complainant as a prerequisite to taking jurisdiction. It is not the latter, for, in almost every case, the power delegated fails to require, for its valid exercise, the approval of the courts. There have been delegations where judicial approval is, in terms, made a part of the legislative act.

Virginia v. Reeves, 100 U. S. 313.

But ours is not such a case.

There is, we suppose it will be conceded, in the constitutional grant under present consideration, no pretense of requiring judicial sanction for the valid exercise of the authority bestowed, and the exercise

of the grant may be valid, we submit, without any such sanction. If such sanction were necessary, an otherwise legal ordinance, fixing water rates, would not be effective until the Supreme Court of the State of California had approved it. There is plainly no such requirement.

It is, of course, unnecessary for us to call the attention of this court to the opinions of the Supreme Court of California holding that the board of supervisors of the City and County of San Francisco is not only the only agency of the state which can fix rates to be charged for water by that municipality, but also that upon it is imposed the duty of so doing, and that for a failure to perform that duty the individual members of it may be removed from office.

State action is rather, as we have said, the performance by an agency of the state of an act to which the state has attempted to give the force of a law, and which is performed, under color of, and pursuant to, state authority.

It is respectfully submitted that the order appealed from should be affirmed.

Edward J. McCutchen,
A. Crawford Greene,
Page, McCutchen, Knight & Olney,
Solicitors for Appellee.

No. 2176.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

The City and County of San Francisco, a municipal corporation, et al.,
Appellants,
vs.
Spring Valley Water Company, a corporation,
Appellee.

Brief of John W. Shenk, City Attorney of the City of Los Angeles, and George E. Cryer, Assistant City Attorney of the City of Los Angeles, Amici Curiae, in Support of the Contention of Appellants.

INTRODUCTORY STATEMENT.

Appellee, a California corporation, has filed in the United States District Court, a bill charging that the city and county of San Francisco, a municipal corporation of said state of California, has passed and intends to enforce an ordinance fixing rates to be charged and collected by appellee for water supplied to the inhabitants of the said city and county of San Francisco; that

the rates so fixed are arbitrary and unreasonable and that their enforcement would operate to deprive complainant of its property without due process of law in violation of the Constitution of the United States. It is claimed that these allegations disclose a case involving a federal question under the Fourteenth Amendment and operate to confer jurisdiction on the federal courts, even though there is no diversity of citizenship.

This claim was challenged in the court below, on the ground that the Constitution of the state of California provides that no person shall be deprived of property without due process of law; that by reason of such provision of the State Constitution, the board of supervisors of defendant municipality had no authority from the state to pass an ordinance of such character as the one in question is charged to be; that if the ordinance is confiscatory, it is void under state law; that for that reason the bill does not disclose a controversy, the result of which depends upon the Federal Constitution or laws.

The learned District Court overruled the contention of defendant, retained the case and issued the temporary injunction from which this appeal is taken. The correctness of the order of the District Coprt upholding the claim of federal jurisdiction presents the question to be considered on this appeal.

The undersigned, John W. Shenk, city attorney of the city of Los Angeles, and George E. Cryer, assistant city attorney of the city of Los Angeles, having been granted permission to file a brief herein, as friends of the court, respectfully submit that the learned District

Court erred in retaining this case and in issuing the injunctive order appealed from. We submit that this record does not present a case for federal jurisdiction, and for the following reasons:

BRIEF OF ARGUMENT.

I.

The Fourteenth Amendment is Directed Against Action by the States.

The Fourteenth Amendment is aimed at state action. It is not directed against persons, against cities or against bodies public or private other than states. It is much less comprehensive in that respect than the guarantee of due process to be found in the State Constitution.

To maintain its claim to federal jurisdiction, therefore, appellee must show that the *state of California* has taken action which will operate to deprive it of its property without due process of law or that the *state of California* denies to it the equal protection of the law. But we contend that:

II.

The State of California Has Taken No Action.

Has the state of California deprived appellee of its property without due process of law or denied to it the equal protection of the law? No action has been taken by the state government, or in the name of the state or in behalf of the state, or by any officer of the state government. It is not claimed that the state has acted except through the alleged instrumentality of an agent.

Officers of the city and county of San Francisco, a separate and subordinate subdivision of the state of California, have enacted a certain ordinance which the bill alleges would operate to deprive complainant of its property without due process of law. The state of California, however, by a plain and unambiguous provision of its Constitution, advises complainant, a citizen of the state of California, that its property may not be taken without due process of law, and tells complainant, in effect, that if the charge is true that the ordinance of the city and county of San Francisco is confiscatory, then that ordinance is null, void and of no effect, and directly violates the mandate directed by the people of the state not only to every officer of the state, but to every agency, public or private, operating within the state. In the face of this declaration by the state—in the face of this limitation upon the authority of every agent of the state, plainly and publicly expressed and known to complainant, it nevertheless comes into the federal forum and charges *the state* with the alleged confiscatory act. This too, without any appeal to the principal and without any act of alleged ratification on the part of the principal.

When did it become the law that known limitations upon an agent's authority no longer operate to protect the principal? Is it a tenable legal proposition that an act beyond the known limits of an agent's authority, not confirmed or ratified by the principal is nevertheless the act of the principal?

Is it true that the act of an agent, merely in the exercise of an agency, is the act of the principal, regardless of limitations upon the agent's authority?

Complainant's entire case, in support of federal jurisdiction herein, rests upon an affirmative answer to the last question. In taking this position we contend that appellee has fallen into error. We submit that *limitations on* an agent's *authority* are still operative and that no action by the state of California is shown by this record. Let us first examine this matter on principle.

We contend that:

(a) The City and County of San Francisco Is an Agent of the State of California with Limited Powers, Which Do Not Include Authority to Pass or Enforce a Confiscatory Rate Ordinance.

The Constitution of the state of California provides (Art. 1, Sec. 13):

> "No person shall be deprived of * * * property without due process of law."

This constitutional provision must be read in connection with any act conferring authority to fix rates, and constitutes a limitation on such authority.

If, therefore, the ordinance attacked in this action is confiscatory, it is not authorized by the state. On the contrary it is in direct violation of the organic act of the state.

It would seem too obvious to require argument that this constitutional provision is a limitation upon confiscatory action within the state, at least as extensive in scope as is the Fourteenth Amendment. The Fourteenth Amendment guarantees that the state shall not confiscate. The state guarantees that neither the state

nor any other agency whatever shall confiscate within its borders.

(b) Action by the City and County of San Francisco in the Exercise of a State Agency, but Not Within the Limits of Its Authority from the State, Is Not State Action.

It is an elementary principle of the law of agency, hardly necessary to be stated, that an unauthorized act of an agent is not the act of the principal. In other words, the scope of the agent's authority measures the principal's responsibility.

But what elements enter into the question of authority and what determines the "scope of an agency"?

It is calmly assumed by those who argue in support of federal jurisdiction that an act, *merely in the exercise of an agency,* is the act of the principal *regardless of known limitations* upon the extent to which such exercise of agency is authorized to be carried. It is calmly assumed that because the municipality is given certain authority in the field of public utility rate fixing any act it may assume to perform *in that field* is the act of the state.

Is this assumption warranted by the law? We are told in the course of the opinion of the Supreme Court of the United States in Mechanics Bank of Alexandria v. Bank of Columbia, 18 U. S. (5 Wheat.) 326, that:

> "The liability of the principal depends upon the facts: 1. That the act was done in the exercise, and 2. Within the limits of the powers delegated."

This is the invariable rule as between principal and agent and as between principal and all persons having knowledge of the limitations upon the agent's authority.

In private business transactions the scope of the agent's authority is sometimes held to be broader than the authority actually conferred, *as to persons having no knowledge of limitations upon the agent's authority.* Upon principles of estoppel an "ostensible agency" is said to arise, the extent of which agency as measured by the powers with which the principal has apparently clothed the agent.

But the principles of ostensible agency have no application to a public agent. The powers of such agent are defined by law of which all persons are deemed to have knowledge, hence the authority actually conferred always determines the scope of such agency. On principle it would seem, therefore, that the city and county of San Francisco is the agent of the state of California with authority to fix rates, subject to the limitation that it shall not fix a confiscatory rate; that the act of the city, done (1) *in the exercise,* and (2) *within the limits* of its authority would be the act of the state. But that if, as alleged, the municipality has passed a confiscatory rate ordinance, it has performed an act in the *exercise* of its agency but *not within the limits* of its authority.

Those who contend for federal jurisdiction in cases such as this admit that if a city has not been authorized to fix rates its assumption of authority to pass a rate ordinance will not make such act the act of the state. No criticism is offered upon such cases as Louisville v. Telephone Company, 155 Fed. 725, where federal jurisdiction was denied on the ground that the defendant

city of Louisville had not been ganted authority to fix rates, hence its act, in assuming to pass a rate ordinance, could not be charged to the state of Kentucky and was not state action. Then why should the courts be asked to ignore the other equally important element entering into the question of the agent's authority—*limitations* upon the extent of delegated powers? Appellee would scarcely deny that, if its allegation is true that the rate ordinance enacted by the board of supervisors of the city and county of San Francisco is confiscatory, it is void under the state law. Why is it void under the state law? Because it is in excess of the authority of the city.

The vice in the entire argument for appellee—the essential weakness in the argument for federal jurisdiction lies either in the assumption that the state of California has delegated to its municipality *unlimited authority* in the matter of rate fixing or that limitations upon an agent's delegated authority are of no consequence in determining the responsibility of the principal.

The former alternative position could scarcely be maintained. When appellee asserts that the rate ordinance in question is confiscatory, it has but to turn to the Constitution of the state of California to learn that it is just such ordinances that the city and county of San Francisco is forbidden to enforce.

The state of California has not vested its municipalities with "full and plenary power" to fix rates as seems to have been assumed by the learned District Court of the Northern District of California as indicated in the course of the opinion in San Francisco Gas & Electric

Co. v. City and County of San Francisco *et al.*, 189 Fed. 943. If it has, what is the purpose of the state constitutional limitation referred to above? And by what authority do state courts annul under the State Constitution, the confiscatory acts of such rate fixing bodies? Does the state authorize an act which its Constitution prohibits and makes void? We assert with confidence the contrary. We assert with equal confidence that no municipality of the state of California has authority to enact or to enforce a confiscatory rate ordinance. We would not be understood as contending, however, that wide discretionary power may not be conferred upon state agents nor would we suggest that with unlimited discretionary power the agent's act would be void, merely because its discretion was unwisely or improperly exercised. What we do contend is that *limits may be fixed* beyond which an exercise of discretionary power may not extend. When limits are fixed the scope of the agency is the field thus fixed and limited.

The board of supervisors has certain discretion in the matter of rate fixing.

It may perhaps be said that the board has "full and plenary power" to fix rates *within the limits fixed by the Constitution.* It may fix a high rate or a lower rate but it may not fix a confiscatory rate. If the allegations of the bill are to be taken as true, complainant knows, the court knows and defendants know that the board of supervisors have *assumed* an authority which they do not possess—that they have adopted an ordinance which is null and void under the law of the state, re-

gardless of the Fourteenth Amendment. Do federal courts take jurisdiction to declare null, ordinances which are void under state law?

We submit that according to elementary principles of the law of agency, the act of the city and county of San Francisco done *in the exercise* of its agency but *not within the limits of its authority* is not the act of the state of California.

Having considered on principle the effect of the municipality's want of authority on the question of federal jurisdiction, we may next inquire how stands the matter upon authorities dealing specifically with this question of jurisdiction. This brings us to the consideration of our third point.

III.

An Unauthorized Act of a State Agent is Not, Under the Authorities, State Action, Within the Meaning of the Fourteenth Amendment to the Constitution of the United States.

Seattle Electric Company v. Seattle R. & S. Ry. Co. (C. C. A.), 185 Fed. 365;

City and County of San Francisco v. United R. R. Co. of San Francisco (C. C. A.), 190 Fed. 507;

Huntington v. City of New York, 118 Fed. 683 (affirmed 193 U. S. 440);

City of Louisville v. Cumberland Tel. & Tel. Co., 84 C. C. A. 151, 155 Fed. 725;

Barney v. New York, 193 U. S. 430;

Hamilton Gas Light Company v. Hamilton, 146 U. S. 258;

Memphis v. Cumberland Tel. Co., 218 U. S. 624;

Virginia v. Rives, 103 U. S. 313.

We think that the decisions of federal courts fully warrant the above conclusion.

While the courts have not always discussed or made clear the principle underlying their decisions they have quite consistently held that an *unauthorized act* of a state agent is not within the inhibition against state action, contained in the Fourteenth Amendment to the Constitution. The fact that the courts most frequently have had to consider cases where an alleged state agent had performed an *ultra vires* act—where the agent had assumed to do an act on behalf of the state which was not "an exercise" of any delegated authority, by no means warrants the conclusion that the other element—action *within the limits* of delegated authority—may be ignored.

In the course of the opinion in the case of Huntington v. City of New York, 118 Fed. 683, it is said:

> "The inhibition of the Fourteenth Amendment is against action by a state depriving an individual of his property. * * * A state acts by agents and the inhibition runs against all who are in fact such agents, *acting within the scope of an authority* conferred upon them by the state." (Italics ours.)

Continuing, the learned court says:

> "Now, in the case at bar, the first question to be considered, is whether the state, through its legislature, has given or undertaken to give authority to the rapid transit commissioners to construct this eastern tunnel, which is the thing complained of. If the legislature had merely selected the streets and avenues, and left it to the commissioners to determine whereabouts therein the tunnel should be located, the action of the commissioners would be the action of the state. But it did no such thing.

> It carefully provided for notice and hearing and consents, for the various steps which make up what is understood to be 'due process of law,' all to be carried on to the conclusion which should determine upon a route and general plan sufficiently detailed to show the 'extent to which any avenue is to be encroached upon and the property abutting thereon affected.' Upon such route only, and under such plan only, is any authority to construct conferred by the state on the defendants or any of them. When they depart from such plan, whatever trespass they may commit upon private rights is one which the state has not only not authorized them to commit, but under any fair interpretation of the rapid transit act has forbidden them to commit."

Referring to the facts involved in the case at bar we find that the state of California has authorized the city and county of San Francisco to fix rates to be charged by public utility corporations for service rendered to its citizens, but *subject to* this important *qualification* that *said city shall fix no confiscatory rate.* May it not be said in this case, as it was said in substance, in Huntington v. New York: When the city departs from its instructions, and fixes a confiscatory rate, whatever trespass upon private rights it may commit is one which the state has not only not authorized it to commit, but under any fair interpretation of the law, has forbidden it to commit.

No one would deny that if the ordinance is confiscatory, it is void under the State Constitution. Why is it void? Simply because it is unauthorized and contrary to the supreme law of the state.

The decision in Huntington v. New York was affirmed by the Supreme Court (193 U. S. 440) upon the

opinion in Barney v. New York, 193 U. S. 430, a case which involved the same facts.

In the course of its opinion in Barney v. New York, *supra,* affirming the decision of the Circuit Court, this court said:

> "Thus, the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the state of New York within the intent and meaning of the Fourteenth Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction.
>
> "Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the state. Complainant's grievance was that the law of the state had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the state; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of, or contrary to, state law. Missouri v. Dockery, 191 U. S. 165, *ante,* 133, 24 Sup. Ct. Rep. 53; Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835, 3 Sup. Ct. Rep. 18; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667."
>
> (48 L. Ed. 740.)

In the case at bar we submit that "it is for the state courts to remedy the act" of the city and county of San Francisco "done without authority of, and contrary to the state law."

City of Louisville v. Cumberland Tel. & Tel. Co., 84 C. C. A. 151, 155 Fed. 725, was a proceeding in equity to restrain the enforcement of a municipal ordinance regulating charges for telephone service in the city of

Louisville, on the ground that the rates prescribed were unreasonable, unjust and confiscatory, and, if enforced, would deprive complainants of their property without due process of law guaranteed by the Fourteenth Amendment. The learned court, after quoting certain allegations of the bill to the effect that the defendant city had not been given authority by the Constitution and statutes of Kentucky to pass the ordinance in question, said:

> "If this be true, there was no state authority behind the action of the Louisville common council, and no ground to claim that constitutional prohibitions have been violated which are pointed at state aggression only. A municipal ordinance may be the exercise of a delegated legislative power conferred upon it as one of the political subdivisions of the state; but, to be given the force and effect of a law of the state, it must have been enacted in the exercise of some legislative power conferred by the state in the premises."
>
> (155 Fed. 729.)

Note that the court observes, in that part of its opinion quoted above, that "to be given the force and effect of a law of the state, it (a city ordinance) must have been enacted in the exercise of some legislative power conferred," etc. If a city ordinance must have *"the force and effect of a law* of the state" in order that it may be considered state action, surely an ordinance in direct violation of the State Constitution is not state action, for it has no force or effect whatever.

The bill, in the last above entitled cause, having alleged that the state had not delegated authority to the city to legislate upon the subject of rates, the court very

properly pointed out that, if such allegation were true, the ordinance attacked had not been passed "in the exercise" of a power conferred by the state, hence the ordinance was not chargeable to the principal—the state, and was not "state action." That was as far as the learned court was required to go in disposing of that case. But as we have already suggested, in order that an act of an alleged agent may be deemed the act of the principal, the agent must have acted "within the limits of his authority," as well as "in the exercise of his agency."

In the case at bar the city was given authority to legislate upon the matter of rates, subject to the limitation that it must not fix an unreasonable rate. If, with such limitation upon its authority, the board of supervisors of the municipality did, as appears from this bill, arbitrarily and without investigation fix an unreasonable confiscatory rate, how can it be said that the act of the municipality was within the limits of its authority and was the act of the state?

The learned Circuit Court of Appeals, in its opinion in the Cumberland case, *supra,* said:

> "There was no state authority behind the action of the Louisville common council,"

hence its action was not state action. May it be said that there is any *state authority* behind the action of the board of supervisors of the city and county of San Francisco, if that action was in direct violation of the supreme law of the state? Does the state authorize an act which its Constitution prohibits and makes void?

> "There can be no difference between an ordinance which has been enacted *ultra vires* and an ordinance which has been enacted in violation of a general statute of the state which prohibits the precise and specific act which is done by the ordinance. In neither case is the ordinance state action, for in both cases it is void under the state law."
>
> City and County of S. F. v. United R. R. of S. F. (C. C. A.), 190 Fed. 507.

And there can be no difference in principle between an ordinance enacted in violation of a general statute of the state and an ordinance enacted in violation of the supreme law of the state, the Constitution. How may a state be said to deprive its citizen of his property without due process of law, when the alleged act of deprivation is confessedly made void by the supreme law of the state, and its courts are open to him to have the act so adjudged? It is said by Judge Cooley (Const. Limitations, 7th Ed., pp. 259, 260):

> "When a statute is adjudged to be unconstitutional it is as if it had never been. Rights cannot be built up under it. Contracts which depend upon it for their consideration are void. It constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is also true as to any part of an act which is found to be unconstitutional and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."

The very allegations of fact that complainant must make in order to state a case for relief under the Fourteenth Amendment establish, if true, the conclusion that

the ordinance was unauthorized by the state and that it is absolutely void under the state law. Is a citizen of a state justified in going, or may he be permitted to go to the courts of the United States complaining that *his state* is attempting to deprive him of his property without due process of law, when he confesses that, if the matters and things involved in his complaint are true, the law of his state makes the act of alleged deprivation null and void and of no effect? We think not.

In the comparatively recent case of Memphis v. Cumberland Telephone Company, 218 U. S. 624, the Supreme Court had under consideration the question of federal jurisdiction to grant relief from an alleged confiscatory rate ordinance passed by the city of Memphis. In the course of its opinion, declaring against the existence of federal jurisdiction, the court reviews and approves many of the above cited decisions. Speaking by Mr. Justice Day, the court says:

> "It appears from an examination of the bill that it is distinctly charged therein that the ordinance was passed without authority of the state, and its attempted passage it is alleged was an abuse of power by the city. There is no reference in the bill to any provision of the Federal Constitution. If any can be said to be violated, it must be the Fourteenth Amendment. It is hardly necessary to say that that amendment is aimed at state action, in the provision that no state shall deprive any person of life, liberty or property without due process of law. The bill, therefore, so far from charging a violation of the Fourteenth Amendment by an authorized action of the state, distinctly and in terms avers that the ordinance was passed without state authority. That such municipal legislation does not lay the foundation of federal jurisdic-

tion has been repeatedly held in this court. Hamilton Gas Light Company v. Hamilton, 146 U. S. 258, in which many of the previous cases in this court are cited. In that case Mr. Justice Harlan, speaking for the court, said of an ordinance passed without legislative authority: 'A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States.'

"In Barney v. City of New York, 193 U. S. 430, the bill invoked the jurisdiction of the Circuit Court of the United States upon the ground that the plaintiff was deprived of his property without due process of law; other allegations of the bill showed that the matters complained of were not only not authorized, but were forbidden by the legislation of the state, hence the action did not invoke the protection of the Fourteenth Amendment because of action by the state of New York, and therefore it was held the bill was properly dismissed for want of jurisdiction. In that case some of the previous cases in this court, to the same effect, are reviewed by Mr. Chief Justice Fuller, who delivered the opinion of the court.

"A question closely analogous to the one at bar came before the Court of Appeals of the Sixth Circuit, Judge Lurton delivering the opinion of the court. City of Louisville v. Cumberland Telephone & Telegraph Co., 155 Fed. Rep. 725. In that case the jurisdiction of the Circuit Court was invoked on the ground that the ordinance of the ctiy of Louisville regulating rates was in violation of a contract between the complainant and the city; also on the ground that the rates were unreasonable, unjust and confiscatory, depriving the complainant of property without due process of law, in violation of the Fourteenth Amendment of the Constitution. In that case the bill was dismissed upon the ground that the allegations of the complaint showed that the case was not one arising under the Constitution and laws of the United States. This was held to be so because of other statements of the bill,

which it was held negatived state action, which alone could lay the foundation of jurisdiction, in that it averred that no power to regulate the rates charged by the complainant had been granted by the state of Kentucky to the municipality which had undertaken to pass the regulating ordinance, and that the attempt to pass such ordinance was an unwarranted and unfounded assumption of power upon the part of the city.

"The claim that the jurisdiction should be sustained because the common council of the city of Louisville had assumed to act under authority of the legislature of the commonwealth of Kentucky, which was averred in the bill, was answered by the court saying that the existence of such regulating power was distinctly negatived by the allegation of the bill that the city had acted in the premises wholly without authority.

"So, in the present case, the statements of the bill are clear and distinct that the passage of the ordinance was without power, and a usurpation on the part of the city; and the allegations of the bill as to the confiscatory character of the ordinance can, consistently with the other averments of the bill, be referred only to the State Constitution, which, as well as the Federal Constitution, inhibits attempts to take property without due process of law."

An attempt may be made to distinguish the cases upon which appellant relies on the ground that *the allegations of the bill* in these cases showed a want of state authority for the act in question, while in the case at bar, the bill alleges that the act was done by authority of the state. As we view the matter, however, *this record,* consisting of the bill and the affidavits before the court on the application for an injunction, shows that the city and county of San Francisco had

power to fix utility rates, subject to the limitation that it should not fix a rate that would operate to deprive any person of property without due process of law.

Expressed differently, we think it sufficiently appears *from this record,* as it is stated to have been averred in the bill considered in Louisville v. Cumberland Tel. Co., 155 Fed. 725, that:

> "Defendant has enacted a certain ordinance whereby it undertook to fix the maximum rates which complainant might charge its patrons in the city; that the city had no lawful power to fix other than reasonable rates; that the rates fixed by the ordinance were unreasonably low; that the enforcement of the ordinance would, for that reason, practically confiscate plaintiff's property and thus it would be deprived thereof by the city without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States."

When *the record shows* that the city and county of San Francisco had no authority from the state to fix other than reasonable rates, but that it nevertheless proceeded to fix an unreasonable confiscatory rate, action in excess of state authority is shown. Our authorities, therefore, apply.

In his review of the authorities, in the course of his opinion in the case of the Home Telephone & Telegraph Company v. The City of Los Angeles *et al.,* District Judge Wellborn made the timely observation that no case had been cited where the Supreme Court of the United States had held that an ordinance of a city manifestly in violation of the State Constitution, is action by the state. We know of no decision of the Supreme

Court to that effect. We do not anticipate that there will be any such decision until that court is prepared to affirm that the unauthorized act of an agent is the act of the principal and that a state deprives its citizen of his property by an act of a state agent which never had any validity under the state law.

IV.

The Result of this Suit Does Not Depend Upon the Effect or Construction of the Fourteenth Amendment, Hence the Suit is Not One Arising Under the Constitution or Laws of the United States.

Recent decisions indicate that the claim of federal jurisdiction herein should fail for the above stated reason.

Memphis v. Cumberland Tel. & Tel. Co., *supra;*

Seattle Electric Company v. Seattle R. & S. Ry. Co., *supra;*

City and County of San Francisco v. United R. R. Co. of S. F., *supra.*

In Memphis v. Cumberland Telephone & Telegraph Co., *supra,* an action involving telephone rates in the city of Memphis, it was alleged in the bill that the ordinance was passed without authority of the state and that its attempted passage was an abuse of power by the city, and the Supreme Court said:

> "We said by the chief justice, in Western Union Telegraph Co. v. Ann Arbor Railroad Co., 178 U. S. 239: 'When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, *upon the determination of which the result depends,* it is not a suit arising under the Constitution or laws.' "

Under the allegations of the bill and of the plea, the determination of the case at bar does not depend upon the construction of the Fourteenth Amendment to the Constitution of the United States. The complainant has alleged that the ordinance is confiscatory. If that be so it was passed contrary to the mandate of the state, contrary to the law of the state and is not the action of the state.

If the Fourteenth Amendment had never been passed *the result of this suit should be exactly the same.* If the ordinance attacked is confiscatory it is void, regardless of the Fourteenth Amendment. *This suit does not,* therefore, *involve a controversy, the result of which depends,* in any degree, *upon the effect of the Fourteenth Amendment* or upon the effect of any other law of the United States.

Seattle Electric Company v. Seattle R. & S. Ry. Co. (C. C. A.), 185 Fed. 365, and City and County of San Francisco v. United R. R. Co. of San Francisco (C. C. A.), 190 Fed. 507, declare in substance, that no question involving the effect or construction of the Fourteenth Amendment arises where the State Constitution contains a similar provision.

This court will recall that in the Seattle case, *supra,* speaking by Judge Morrow, it said:

> "But there is a further and, as we believe, a conclusive objection to the claim of right on the part of the complainant to invoke the jurisdiction of the Circuit Court on constitutional grounds. It seems to us that in no aspect of the grant to the defendant is there a real and substantial dispute or controversy dependent upon the application of

provisions of the Federal Constitution. If it should be conceded that in some view of the ordinance and defendant's action, under color of its provisions, there would be a taking of complainant's property without due process of law, still it would not follow that the Circuit Court had jurisdiction of the case unless the ordinance in that respect would be the supreme law of the state. The supreme law of the state is the Constitution of the state; and that document provides in article 1, section 3, as does the Fourteenth Amendment to the Constitution of the United States, that: 'No persons shall be deprived of life, liberty or property without due process of law.'

"Under this provision of the State Constitution the ordinance would be as invalid as under the Federal Constitution. It would be with respect to the former as the complainant charges in its complaint with respect to the latter, 'without authority in law, null and void, and of no force and effect.' The presumption is that the courts in Washington will not deny to any of its citizens or corporations the equal protection of its Constitution. If, however, it should turn out that we are mistaken in this respect the complainant will have his remedy in an appeal from the highest court of the state to the Supreme Court of the United States. 'The doctrine here is that the aggrieved party must first invoke the aid of the state courts, since it is for the state courts to remedy the acts of state officers done without authority of, or contrary to, state law. In such a case the complaining party must exhaust his remedy in the state courts by prosecuting his case in the state court of last resort for cases of that character; and until he has done this, it cannot be said that he has been denied due process or deprived of his property by state action. If the decision of the highest state court to which he can resort is adverse to him, he can then take his case on a writ of error to the United States Supreme Court upon the ground, not that the proceeding or action

> complained of was contrary to or unauthorized by state law, but upon the ground that what was complained of as a deprivation of life, liberty or property without due process of law in violation of the Fourteenth Amendment has at last received the sanction of the state and, in effect, become the act of the state itself.' "

In the later case of City and County of San Francisco v. United R. R. Co. of S. F., *supra,* the doctrine of the Seattle case was expressly reaffirmed.

We repeat that this case does not present a controversy, the result of which depends in any degree, upon the Fourteenth Amendment to the Constitution of the United States; that if said amendment had never been adopted the result of this suit should be exactly the same. For that reason, and on the above authorities, there is no federal jurisdiction of the cause.

Summarizing the argument from the standpoint of appellee, we submit that the solution of the problem, presented by this case, lies in an application of the principles of agency; that, on principle, the act of an agent, done in the exercise of his agency, but not within the limits of his authority, is not the act of his principal; that, on authority, the act of a state agent in violation of authority from the state, is not action by the state; that if, as alleged, the ordinance here attacked is confiscatory, it is void under the state law, and for that reason the cause does not present a controversy, the result of which depends upon the effect or construction of a law of the United States.

V.

Appellee's Arguments and Authorities Considered.

Since preparing the above statement of the argument against the existence of federal jurisdiction in this class of cases, we have been favored with copies of the briefs on behalf of the respective parties to this case and have listened to the oral arguments submitted to the court in support of their respective contentions.

The essential point of difference between our position and that of the appellee may be stated in a very few words.

We contend that in order that the act of the municipality may be deemed to be the act of the state, such act must be authorized by the state—that is to say, the act must be done (1) in the exercise of an agency, and (2) within the limits of the authority delegated, while appellee contends that an act by a municipality, merely in the exercise of an agency, is to be deemed to be the act of the state. Or, as counsel sometimes prefer to express it, if an act was done under mere "color of authority," "if the agency acts in excess of its powers, but not in violation of them; * * * if the ordinance is a valid enactment except for its repugnancy to the Constitution, * * * in all such cases it has been judicially determined that the state has acted, and that the act performed is state action, within the meaning of the Fourteenth Amendment."

Appellant argues that the act of the agent must be authorized or it is not the act of the principal. Appellee contends that "color of authority" for the act makes it the act of the state.

Appellant argues the case on principle, supplemented by authority—appellee wholly from the standpoint of authority. Appellant contends that the cause is to be determined by an application of principles of agency; that an unauthorized act of a municipality is not the act of the state. Appellee admits that a "wholly unauthorized" act of a city is not the act of the state, but claims that an act done "under supposed legislative authority" is state action.

It is said that if an "ordinance is a valid enactment except for its repugnancy to the Constitution" it is state action according to the authorities. (Appellee's brief, p. 54.)

These contentions of appellee are surely worthy of examination.

If, in the face of an admission that an unauthorized act of a municipality is not the act of the state, it is still true that an ordinance of a city is the act of the state, though invalid because repugnant to the State Constitution, there must be some reason for such conclusion. Appellee does not attempt to justify its assertion except by the declaration that the authorities so hold.

Do the authorities so hold?

We have neither the time nor the inclination to review all of the cases cited by counsel. In many of the cases cited the court was considering an entirely different matter from that presented by this record.

For instance, at pages 32 and 33 of its brief, appellee directs attention to the case of City Street Ry. Co. v. Citizens Street R. Co., 166 U. S. 561, 41 L. Ed. 1116, and says:

"The action had here been brought upon the ground that defendant had attempted, by the passage of a municipal ordinance, to impair the obligation of a contract entered into with complainant by it. In the lower court, the point now so strenuously urged was directly raised and considered."

Then follows a quotation from the opinion of the Circuit Court when the case was under consideration below.

An examination of the opinion indicates that counsel are in error when they assert that "the point now so strenuously urged was directly raised and considered." It nowhere appears that the *State Constitution* of Indiana contained a provision prohibiting the passage of any law impairing the obligation of contracts, or that by reason of the existence of such state constitutional provision, the city of Indianapolis had performed an act that was unauthorized. The quotation presented by appellee in its brief (p. 32) shows clearly that the claim was that the provision of the *Constitution of the United States* (Art. 1, Sec. 10) should be read into the state statute conferring power upon the city. *This is an entirely different proposition.* It never has been claimed that the action of the city and county of San Francisco was unauthorized merely *because it violated law,* or because it violated the supreme law of the land —the Federal Constitution. The claim has been that it was not the act of the state *because it violated the State Constitution,* and hence was not authorized by the state.

The city is not the agent of the federal government.

It is the agent of the state. The State Constitution is in the nature of a general order to state agents.

The state may authorize its agents to take action which violates the supreme law of the land, just as any other principal may instruct his agent to perform an act which invades the legal rights of others, thereby violating the law and rendering the principal liable.

No one would contend that the law of the state should be read into and become a part of a private principal's instructions to his agent, thereby limiting the powers of the agent. If that were true no agent could ever violate the legal rights of another person by authority of his principal. "The bane and the antidote would go together."

Neither the city of Indianapolis nor the city and county of San Francisco is an agent of the government of the United States. One is an agent of the state of Indiana, the other of the state of California. Their powers, as state agents, are to be found in the Constitutions and laws of their respective states. Both are, of course, subject to the supreme law of the land—the Federal Constitution, and wherever that supreme law operates directly against persons or cities they may take action which will violate that law. Since the Fourteenth Amendment is directed against their principal—the state—they may, when properly authorized by the state, take action which shall operate to charge their principal with a violation of that amendment. But when, in any other capacity than as authorized agents of the state, they take action which operates to deprive any person of property without due process of law,

they do not violate the Fourteenth Amendment, for they are not states. They would, however, violate a constitutional provision declaring that no person shall be deprived of property without due process of law.

We entirely agree with the conclusion reached by the court in City Street Ry. Co. v. Citizens St. Ry. Co., *supra.* We entirely agree with the statement of law quoted on page 32 of appellee's brief. Neither the case nor the statement quoted, however, lend any support whatever to appellee's contention in this case. On the contrary, insofar as the case may be regarded as authority on the question here in issue, *it supports the contention of appellant.* Note again the language of the court as quoted by appellee in its brief:

> "*If* the law of the state, or *a municipal grant* under its authority, *is a valid enactment,* except for its repugnancy to the provision of the Constitution *which prohibits a state* from passing any law impairing the obligation of contracts, then *such repugnancy* presents a federal question, and gives this court jurisdiction."

Note the statement of the court—"if the municipal grant" under state authority "is a *valid enactment,* except for its repugnancy to the provision of the Constitution which prohibits a state from passing any law impairing the obligation of contracts." Is that case authority for the statement that a municipal ordinance, *invalid* because repugnant to the State Constitution, is the act of the state?

Note the peculiar position into which appellee is forced in its efforts to support the proposition that an ordinance which is null and void under the state law

is nevertheless the act of the state. Note how appellee would avoid the force of such decisions as Memphis v. Cumberland Tel. & Tel. Co., 218 U. S. 624; Louisville v. Cumberland Tel. & Tel. Co., 155 Fed. 725, and cases of that type.

Counsel say (brief, pp. 21-22):

"We concede that the state has not acted when individuals, even though they may be state officials, violate property rights, where there is no law of the state which even purports to confer upon them the authority to so act. Redress in such cases must be had in the courts of the state."

We infer, then, that it is not claimed to be literally true, as stated in the Raymond case, that "whoever by virtue of public position under a state government deprives another," etc., violates the Fourteenth Amendment. Continuing, counsel say:

"The very large proportion of those cases in which litigants were forced to seek their remedy in the state courts were those in which municipal ordinances were attacked on the ground that they were wholly unauthorized by the state, the legislative body of the municipality having no power under the state law to pass any ordinance whatever of the kind in question. If there was this lack of power, there was not state action and no federal question was presented."

We infer from the above that counsel attach special significance to the word "wholly" in the phrase "*wholly* unauthorized," and that they regard it as an important circumstance whether the municipality did or did not have power to pass any ordinance *whatever* of the kind in question. Do counsel mean to imply that there is a sort of "twilight zone," in which the act of the city,

unauthorized but not *wholly* unauthorized is nevertheless the act of the state? Do counsel contend that an ordinance of a city which is in excess of the city's powers and void, because repugnant to the State Constitution, is the act of the state, merely because the city had authority under which it *might have passed a valid ordinance?*

We contend that there is no such twilight zone as appellee has indicated. If the act is in excess of the public agent's authority it is not the act of the principal. We repeat that the "scope of an agency" is the authority actually conferred, where knowledge of that authority is shown, and that in the case of a public agent, with powers defined by law, the authority actually conferred is the scope of the authority.

Because, in the course of some of the opinions, will be found statements to the effect that—"an ordinance not passed under supposed legislative authority, cannot be regarded as a law of the state" (Hamilton Gas Light Co. v. Hamilton, *supra*), by no means justifies the assertion that the authorities hold that an ordinance *passed* under supposed legislative authority is the act of the state.

Because the municipality has "claimed" or "assumed" to have authority to pass and enforce the ordinance in question, is not sufficient to make the ordinance the act of the state.

Louisville v. Cumberland Tel. & Tel. Co., *supra.*

We think that of the other cases cited by appellee in support of its contention, but four are sufficiently in point to merit further consideration in this hasty review.

The cases referred to are:

Raymond v. Chicago U. T. Co., 207 U. S. 20;

Des Moines City Ry. Co. v. City of Des Moines, 151 Fed. 854;

Ozark Bell Tel. Co. v. City of Springfield, 140 Fed. 666;

Capital City Gas Co. v. City of Des Moines, 72 Fed. 818.

Taking up first the case last cited, we find a decision by the Circuit Court of the Southern District of Iowa *apparently* sustaining in part the contention of appellee.

We say "apparently" sustaining the contention of appellee. The conclusion reached by the court was that federal jurisdiction existed and that the case should be retained.

(See extended quotation from the opinion at pp. 39-40-41 of appellee's brief.) It will be observed that the learned court makes no attempt to meet the argument against federal jurisdiction. Like appellee in the case at bar, the learned court relies wholly upon what it deems to be authoritative decisions.

Here is the learned court's answer to the argument of defendant:

> "The test which shall determine the correctness of this reasoning is not of difficult application. Had the law making power of the state by statute fixed the rates, and such rates were not reasonable, —and by the term 'not reasonable' rate as I am herein using it is meant a rate so low as not to afford a proper and reasonable return, under the circumstances, for service performed, including gas furnished,—if the statute rates were not reasonable, manifestly the law might be decreed in-

> valid, under the doctrine so clearly announced by Justice Brewer in Ames v. Railway Co., 64 Fed. 165."

Turning to the case cited and relied upon (Ames v. Railway Co., 64 Fed. 165), we find an action *by non-residents* of the state of Nebraska seeking to enjoin the enforcement of railway freight rates fixed by the legislature of Nebraska and alleged to be unreasonable and confiscatory. The Constitution of Nebraska provided (see 64 Fed. 176):

> "And the legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportion of freight and passengers on the different railroads in this state."

With diverse citizenship no federal question was necessary. All that was determined by the court was that the legislature had no power under the State Constitution to fix unreasonable rates; that whether the rates attempted to be fixed were unreasonable and confiscatory was a judicial question; that a state could not, as against citizens of another state, reserve these questions to the determination of its own courts; that if the legislature fixed unreasonable rates they would be declared null.

The discussion in Ames v. Railway is absolutely foreign to the matter under consideration in Capital City Gas Co. v. City of Des Moines. No question of *state action,* within the meaning of the Fourteenth Amendment, was involved.

Complainants, being non-residents, had a right to, and did attack the rates in the federal court, just as a

citizen of Nebraska might have attacked them in the state courts. Having reached the conclusion from the Ames case that rates fixed by the legislature might be successfully attacked in the federal courts, the learned court states that it surely must be true that when the legislature delegates to a municipality the power to fix rates, the rates fixed by such municipality must also be open to judicial investigation.

This is manifestly true provided the investigation is sought in the proper court, but it affords no answer whatever to the argument that unauthorized action is not state action so as to confer jurisdiction under the Fourteenth Amendment. The learned court then cites Reagan v. Trust Co., 154 U. S. 362. Here again we find a case of *diverse citizenship,* with no discussion of the principle involved in the problem under consideration in the Capital City case.

Then follows a citation of the case of Hamilton Gas Light & Coke Co. v. Hamilton City, *supra,* with the observation that that case

"justifies the assertion that the ordinance of a city, when passed in accordance with the forms of law and under assumed and asserted powers delegated to it, and in a direction wherein such powers might be delegated, is the 'law' of the state, within the meaning of that term as used in the constitutional provisions."

We insist that the opinion in question does not justify the assertion quoted above. The Supreme Court did say, in the case of Hamilton etc. Co. v. Hamilton, *supra,* that "A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the states," etc. But it by no means follows that the

court would have said that a municipal ordinance passed under supposed legislative authority, or under "assumed and asserted powers delegated" *was* to be regarded as a law of the state.

On the other hand, so far as appears, the court in the case of Louisville v. Cumberland Tel. Co. was considering an ordinance "passed in accordance with the forms of law."

It was said by the court, in the course of its opinion (155 Fed. 730):

> "That the common counsel 'assumed' and 'claimed' to have the power to do what it did do is self evident. The enactment of the ordinance is in itself, and from any point of view, an assumption and claim of right to do what it did."

Yet the ordinance there in question was not deemed to be state action and federal jurisdiction was denied.

We think the authorities cited in Capital City Gas Co. v. City of Des Moines furnish no answer to the argument of defendants in that case, and no justification for the conclusion reached by the court.

Just at this point we may pause to observe that, in the course of his able argument, counsel for appellee made the point that the ordinance of the city and county of San Francisco was *"prima facie"* a law of the state of California. But is such *prima facie* validity sufficient?

The ordinances under consideration in Louisville v. Cumberland Tel. & Tel. Co., *supra,* and in Memphis v. Cumberland Tel. & Tel. Co. were likewise passed under

the forms of law and pursuant to "assumed and asserted" power and were also *prima facie valid* so as to necessitate attack in the courts. Yet such *prima facie* validity did not make those ordinances acts of the state so as to confer federal jurisdiction.

Ozark Bell Telephone Company v. City of Springfield, 140 Fed. 666, a Circuit Court decision cited by appellee, expressly relies upon an *obiter* comment contained in the opinion in the case of Barney v. New York, 193 U. S. 430. When the Supreme Court in the Barney case used the language quoted by Marshall, district judge, that court was considering the decision theretofore rendered in Reagan v. Farmers Loan & Trust Company. As we have shown, the action of Reagan v. Farmers Loan & Trust Company was by non-resident stockholders. For that reason it was not necessary that the case should be one arising under the Federal Constitution or laws. There is no suggestion in the opinion that the action of the commission was void under state law, because unauthorized by the state. There is no discussion of the matter of "state action" within the meaning of the Fourteenth Amendment. Surely the *obiter* comment on the Reagan case, contained in the opinion in Barney v. New York, furnishes no sufficient reason for the decision in Ozark Tel. Co. v. Springfield.

In Des Moines City Ry. v. Des Moines, 151 Fed. 854, we find the court making the error of assuming that in questioning the existence of federal jurisdiction, the supremacy of the Constitution of the United States is attacked.

As we have elsewhere shown, the jurisdiction is questioned, not on the ground that the agent's act violates law, but on the ground that where it violates the State Constitution, the act is in excess of the state agent's authority, and is not the act of the state.

Raymond v. Chicago Union Traction Company, 207 U. S. 20, is much relied upon by appellee, and properly so, for, in our opinion, it is the one authoritative decision which lends support to the case for the appellee.

That the point here under consideration was raised in the Raymond case is apparent from the briefs of counsel, and that federal jurisdiction was declared to exist must also be conceded. What was the theory of the court and the basis of its decision? In the majority opinion the problem is not discussed on principle. The court tells us that:

> "The provisions of the Fourteenth Amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 21 L. Ed. 979, 17 Sup. Ct. Rep. 581."

This cannot be accepted, in its literal sense, and without qualification, as the decision of the court. To accept it literally and without qualification would make the decision at variance with Barney v. New York,

with the later case of Memphis v. Cumberland Tel. & Tel. Co., and with every other decision where it has been held that one who, "by virtue of public position under a state government, deprives another of property," *but without authority from the state,* does not perform an act constituting state action within the meaning of the Fourteenth Amendment.

Was there not present in the case that which may be deemed a prior authorization by the state—the mandate from the Supreme Court of the state. We have freely conceded and admitted that where an appeal has been made to the State Supreme Court, the body provided by the state to pass upon the authority of state agents and to interpret and apply the State Constitution, the declaration by that body that an act of confiscation is not such is equivalent in law to a ratification by the state, and makes the adopted act that of the state itself.

Where this appeal to the state court is made in advance, it is likewise equivalent to a prior authorization of the act.

In the statement of facts in the Raymond case it appears that the action taken was pursuant to mandate from the Supreme Court of Illinois. If this was true, it was a prior authorization by the state. That great weight was attached by the Supreme Court of the United States to the circumstance that the action of the board was pursuant to mandate from the state court is apparent from the dissenting opinion of Mr. Justice Holmes. In that dissenting opinion it is said:

> "Notwithstanding my unfeigned deference to the judgment of my brethren, I cannot but think that the Circuit Court was wrong in taking jurisdiction

> of this case. We all agree, I suppose, that it is only in most exceptional cases that a state can be said to deprive a person of his property without due process of law merely because of the decision of a court, without more. The discussion in Chicago, B. & Q. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 Supp. Ct. Rep. 581, concerned a judgment assumed to be authorized by a statute of the state, and in that case the judgment of the state court was affirmed, so that no very extensive conclusions can be drawn from it. So far as I know this is the first instance in which a Circuit Court has been held authorized to take jurisdiction on the ground that the decision of a state tribunal was contrary to the Fourteenth Amendment."

It is not apparent from the above statement that the alleged confiscatory action, involved in the Raymond case, was deemed to have had the sanction and approval of the state, through the declaration and mandate of the State Supreme Court, the body provided by the state to construe and apply the State Constitution.

That the prior authorization by the state was not deemed sufficient by the dissenting justices is apparent from that part of the dissenting opinion which follows the above quotation.

Those justices were of the opinion that notwithstanding the prior mandate, *the action taken* pursuant to it should first be questioned in a direct proceeding in the state court by the persons affected, before it could be deemed to have the sanction of the state.

Whether the case be distinquishable from the case at bar on the ground indicated or not, we insist that to give to the majority opinion the literal interpretation insisted upon by appellee is to place the case in apposi-

tion to numerous decisions of the Supreme Court, both earlier and later than the decision in question.

Without further consideration of appellee's authorities we pass to a few closing observations.

VI.

The Conclusion Does Not Follow that the Adoption of Defendant's Contention Herein Would Mean the Destruction of Federal Jurisdiction to Enforce the Guaranties of the Fourteenth Amendment.

It is said that the logical result of our argument would be the destruction of all federal jurisdiction to enforce the guaranties of the Fourteenth Amendment. It is argued that if a case in which denial of due process is charged were taken to the Supreme Court of the United States on appeal or writ of error to a State Supreme Court, and that court should therein determine that the charge were true, this would only establish, if our position here is correct, that the act complained of was done in violation of the State Constitution, and therefore without authority of the state, and so was not prohibited by the Federal Constitution or remediable by any federal court.

We cannot concede the accuracy of that reasoning.

It entirely omits from consideration the element of ratification. It has been our contention that an act of an alleged agent could not be deemed to be the act of its principal if it was found to be in excess of its authority; that the Constitution of the state was to be deemed to be in the nature of a general order to subordinate agencies of the state; that the alleged act of the municipality, in this case, could not be deemed to

be the act of the state, because in excess of the municipality's authority, and null and void under state law. It is to the city's principal, the state, that the Fourteenth Amendment is directed. When, however, the act of the city is called in question before the Supreme Court of the state—the body provided by the state to pass on such matters for the state, and that body determines that an act of confiscation is not such, then may it be said that the state has ratified and confirmed the confiscatory act and made it the act of the state. The injured party may then take his case to the Supreme Court of the United States, by writ of error, and rightfully complain that *his state* deprives him of his property without due process of law.

Seattle Electric Co. v. Seattle R. & S. Ry. Co., *supra;*

Virginia v. Rives, *supra.*

It is true that the principle for which we contend, that the state must ratify and confirm an act of a city government, which violates the State Constitution, before federal jurisdiction under the Fourteenth Amendment shall attach, would oust the inferior federal courts of original jurisdiction *in all similar cases.* Whether the operation of this principle should be extended so as to include those agencies which constitute the state government, which act for the state, and in the name of the state, and which, for some purposes, may be regarded as the state, is a question not now before the court. Logically, we should say that no act of any state agent, in excess of his authority and in violation of the State Constitution, should be held to be the act

of the state until that act had been ratified by the state, by the declaration of its Supreme Court, the body provided by the state to pass on the question of the constitutional authority of state agents.

The Supreme Court, however, has indicated that where one "acts in the name of the state and for the state and is clothed with the state's powers, his act is that of the state." (Raymond v. Chicago Union T. Co., 207 U. S. 20, 52 L. Ed. 78.) Whether by the above statement the court is to be understood as meaning that one who, acting for and in the name of the state, is doing an act in violation of the State Constitution, and which, presumptively, the state will enjoin and prevent if appealed to, may be said to be "clothed with the state's powers" is a matter we need not here consider. As stated by Judge Wellborn in his opinion in the case of Home Telephone & Telegraph Company v. City of Los Angeles, there is an important difference between the act of a state officer, acting for and in behalf of the state and in the name of the state, and the act of a subordinate agency, such as a city government which does not act for, or in the name of the state, and does not represent the state, except in a limited sense.

As to these subordinate state agents, at least, we submit that it would violate a thoroughly established principle of agency to hold their unauthorized acts to be the acts of the state.

Even if it be agreed, however, that the logical result of our contention would be the destruction of all original jurisdiction of the inferior federal courts, in cases

arising under the Fourteenth Amendment, we cannot see how that consideration is material. The court is here *applying* the law and the Constitution. It is not engaged in *making* either. It is applying a Constitution which says that no state shall deprive any person of property, not one which says that no person shall be deprived of property. Nor is it applying a Constitution which provides that no *city* shall deprive any person of property.

Let us not be led into an indefensible position in an effort to retain a jurisdiction which does not exist. If it is desirable that the inferior federal courts should have a jurisdiction that they do not lawfully possess, let the Constitution be changed.

As for the inferior federal courts, congested with a mass of litigation of this character which it was never intended that they should handle, and which should be taken care of in the state courts, they will doubtless grieve but little over its loss. They got along fairly well for over seventy years without the Fourteenth Amendment or any of the class of litigation that came crowding in upon them following its adoption. As for the litigant, we have shown that he has his remedy as against an erroneous state judgment which operates to deprive him of his property without due process of law.

In conclusion it is to be noted that

VII.

Any Reasonable Doubt as to the Existence of Jurisdiction Should be Resolved Against It.

If, from the examination of the authorities, and after consideration of the arguments submitted, this court should entertain a doubt on this question of jurisdiction that doubt should be resolved against the existence of jurisdiction. The interests of all parties would be best subserved by the court's declining to uphold a doubtful claim to jurisdiction.

It has been well said that:

> "The courts of the United States have limited jurisdiction; that is, their jurisdiction extends only where the statute confers it. * * * The great mass or portion of jurisdiction over controversies resides in the state courts; and properly so, since all powers not delegated by the Constitution to the United States reside in the people of the states. Therefore, if jurisdiction is not clearly apparent in the federal courts, or if there arises reasonable doubt as to whether such courts have jurisdiction in any controversy those courts should not assume jurisdiction. It is very important, at the threshold of this action, that this question of jurisdiction be settled, for in the further progress of the action, in whatever appellate tribunal the action may be pending, if such tribunal should discover a lack of jurisdiction in the federal court, this action would be dismissed, and thus years of labor, and large expenses, might prove in vain. * * * Had plaintiff begun this action in the state court, instead of this court, that court would have had undoubted jurisdiction, and could have proceeded to judgment. The same allegations of fact which are made in bill herein as to violation of provisions of the Consti-

tution of the United States could have been there made; and if, in the progress of the litigation, the Supreme Court of the state had decided adversely to plaintiff's claim—that is, held the action of the City Council valid, and not violative of the federal Constitution,—plaintiff could have carried its contention as to this question to the Supreme Court of the United States for its authoritative, binding decision; and thus, through that channel of litigation, might the final decision have been reached in this controversy, and by the same tribunal wherein such final decision may be reached, if carried on in this court. This consideration makes the action of this court, if adverse to plaintiff on the subject of jurisdiction, not a deprivation of its right to have the controversy heard, but merely compels plaintiff to pursue its remedy through another court. Since, therefore, this action will be hereafter dismissed, if in this court, or in any court to which the action may be carried, it is determined that this court is without jurisdiction herein, and since other courts are open to plaintiff where the jurisdiction is unquestioned, this court ought not to proceed further, but at the very threshold should stop and refuse to act on the merits of the controversy, unless this court is clearly satisfied that it has jurisdiction. All reasonable doubts on this subject must be solved against such jurisdiction."

Capital City Gas Co. v. Des Moines, 72 Fed. 819-20

As friends of the court we respectfully submit the above for its consideration. We think that the decision below was erroneous and should be reversed.

JOHN W. SHENK,
City Attorney of The City of Los Angeles;
GEORGE E. CRYER,
Assistant City Attorney of The City of Los Angeles,
Amici Curiae.

No. 2176

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO (a municipal corporation) et al.,
Appellants,

vs.

SPRING VALLEY WATER COMPANY (a corporation),
Appellee.

BRIEF OF APPELLEE

In Reply to Brief of John W. Shenk, City Attorney of the City of Los Angeles, and George E. Cryer, Assistant City Attorney of the City of Los Angeles, Amici Curiae.

Because of the importance of the question involved, representatives of the City of Los Angeles were granted leave to file a brief in this case as *amici curiae,* and it was ordered that appellee might reply thereto. This brief is that reply.

The issue raised on this appeal has already been clearly shown, and we shall not here repeat our former

statement of the case. The question is purely one of law and may be accurately stated thus: Is the assumption of jurisdiction by the District Court of the United States warranted in a case in which it is made to appear that a California municipality, acting through its board of supervisors, has enacted an ordinance fixing rates to be charged for water which are unjust and confiscatory? This is the sole issue in the case, and the only question which any party interested has discussed. It is conceded that federal courts have jurisdiction in cases of this impression only when the relief asked is against action by the state, and that, if appellee has not stated a case in which it is shown that the State of California has acted, the order appealed from should be reversed. The question, the answer to which is essential to a decision in this case, is the following: "What is state action?"

Counsel for appellant base their entire argument upon the ground that the City and County of San Francisco, in passing the rate complained of, was an agent of the state, and that its authority was, because of the provisions of the constitution of California, one to fix reasonable rates only; that, if unreasonable rates were fixed, the action was unauthorized, and not that of the state. They, at first, carried their contention so far as to declare that no instrumentality of the state has power to enact a confiscatory ordinance, because of the presence in the constitution of the State of California of a provision similar to that found in the fourteenth amendment to the constitution of the United States; at the oral argument counsel receded from the position

at first taken, and admitted that, if the power to fix rates had been vested in the legislature by means of language identical with that employed in granting that power to the municipalities of California, the action of the legislature, pursuant to the authority thus given, would then, were the rate so passed confiscatory, have been state action. The excuse offered for the distinction made was, that in such a case the body exercising the power would have been "nearer" the state, and that there would not then have been a delegation of the peculiar character of that with which we are, in our case, dealing. We shall pass, for the moment, a discussion of the principle thus contended for.

The representatives of the City of Los Angeles do not make their admissions so sweeping, but their argument is the same. They, in much the same way, and, at times in the same language, insist that the problem is one of agency alone; that, for a principal to be bound, an agent must act in the exercise and within the limits of the power delegated; that the authority given by the state, in our case to its agent the municipality, is one to fix rates, but that that power is limited to an exercise which shall not deprive a citizen of property without due process of law, and that any exercise by a municipality which does deprive a citizen of property without due process of law is unauthorized and is not action by the principal, the state. Counsel thus state their contention:

> "We submit that, according to elementary principles of the law of agency, the act of the City, and County of San Francisco, done in the exercise of its agency, but not within the limits of its authority, is

not the act of the State of California." (Brief, p. 12.)

And,

"Summarizing the argument from the standpoint of appellee, we submit that the solution of the problem, presented by this case, lies in an application of the principles of agency; that, on principle, the act of an agent, done in the exercise of his agency, but not within the limits of his authority, is not the act of his principal; that, on authority, the act of a state agent in violation of authority from the state, is not action by the state; that if, as alleged, the ordinance here attacked is confiscatory, it is void under the state law, and for that reason the cause does not present a controversy, the result of which depends upon the effect or construction of a law of the United States." (Brief, p. 26.)

This is the single argument which counsel urge as entitling appellant to a reversal of the lower court's order. They fully appreciate the difficulties involved in applying the principle contended for when the legislature, instead of a municipality, enacts a law contrary to the provisions of the constitution and they refuse to definitely commit themselves as to whether action of that character is or is not state action, or to join in the broad concession of appellant which we have previously considered. They say:

"It is true that the principle for which we contend, that the state must ratify and confirm an act of a city government, which violates the state constitution, before federal jurisdiction under the fourteenth amendment shall attach, would oust the inferior federal courts of original jurisdiction in all similar cases. Whether the operation of this

principle should be extended so as to include those agencies which constitute the state government, which act for the state, and in the name of the state, and which, for some purposes, may be regarded as the state, is a question not now before the court. Logically, we should say that no act of any state agent, in excess of his authority and in violation of the state constitution, should be held to be the act of the state until that act had been ratified by the state, by the declaration of its Supreme Court, the body provided by the state to pass on the question of the constitutional authority of state agents.

"The Supreme Court, however, has indicated that where one 'acts in the name of the state and for the state and is clothed with the state's powers, his act is that of the state'. (Raymond v. Chicago Union T. Co., 207 U. S. 20, 52 L. Ed. 78). Whether by the above statement the court is to be understood as meaning that one who, acting for and in the name of the state, is doing an act in violation of the state constitution, and which, presumptively, the state will enjoin and prevent if appealed to, may be said to be 'clothed with the state's powers' is a matter we need not here consider." (Brief, pp. 43-44.)

We believe that the most superficial examination of the argument thus urged will demonstrate its error. The test required by it is the sanction of the state Supreme Court. If the ordinance complained of is determined to be unconstitutional, the state has not acted; if constitutional, the reverse is true. Federal courts, if this argument is sound, may take jurisdiction only in those cases in which the act complained of has received the approval of the state Supreme Court, and it necessarily follows that no ordinance is attributable

to the state until the Supreme Court of the state has held it to be constitutional. The rule applies to actions by all state instrumentalities whether valid or invalid. If an ordinance is not the act of the state until it is determined to be constitutional, an act of that character can only be action by the state after such determination, and in no case of the kind here considered may the state be said to have acted before the sanction of the Supreme Court has been had. The Supreme Court is then the actor, not the legislature or the municipality. We need hardly point out that this is making the judiciary perform a legislative function which is not contemplated or warranted by the organic law of this state.

Examining the argument from another angle, we find that by its adoption federal courts would be deprived of *all* jurisdiction in cases of this character. It is conceded by counsel that they are denied all *original* jurisdiction, but it is contended that because of the ratification by the state Supreme Court, the Supreme Court of the United States would be warranted in assuming jurisdiction in those cases which may be brought to it by writ of error. This suggestion entirely ignores the very basis of the argument advanced. The contention is that the state has not *acted* if the act in question violates the state constitution. The federal constitution, it is admitted, only affords relief against state action, and it is apparent that if the Supreme Court of the United States determines that notwithstanding the sanction of the state court, the law violates a prohibition of the state constitution, it must hold that the law is not a law of the state and is not state action. Thus, in no

case submitted to it, where it is alleged that a state is depriving a citizen of property without due process can that court grant relief, for as soon as it finds the act to be unconstitutional it, by that finding, determines that the state has not acted, and, hence, that it is without jurisdiction to determine the issues raised in the case. The principle of ratification is inapplicable since jurisdiction may only be assumed where it appears that the state has acted, and counsel says without qualification that the state may not be said to have acted in a case in which the action, if enforced, will violate a constitutional prohibition.

Furthermore the argument itself is founded upon an entirely erroneous assumption. The contention is, that we have pleaded that the rate complained of is confiscatory and that the passage of confiscatory and unreasonable rates is prohibited by the California constitution. We did plead that the rate prescribed by the ordinance was unreasonable and confiscatory *under the constitution of the United States.* We did *not* plead that it was so under the constitution of the State of California. The distinction between these two statements is marked, and is strikingly illustrated by actual decisions. The reasonableness and justice of a given rate depends upon the rate of return it will yield. The determination of the fairness of the rate, therefore, is the controlling factor in deciding whether or not its enforcement will deprive complainant of its property without due process or adequate compensation. What is a reasonable rate depends upon the decision of the court appealed to. The Supreme Court of California

has held in a recent case that a return of 5 per cent is not unreasonably low.

Contra Costa Water Co. v. City of Oakland, 159 Cal. 323,

while the Supreme Court of the United States, in

Willcox v. Consolidated Gas Co., 212 U. S. 40; 54 L. Ed. 382,

held that a return of less than 6 per cent is unfair. Various other federal courts have found a similar unfairness with regard to rates yielding less than 7 per cent. What may be held confiscatory under the federal constitution in a federal court may not be held unreasonable by a state court in interpreting a state constitution. The only injustice we complain of is an act which violates the guaranties of the constitution of the United States. We do not plead that any provision of the state constitution has been violated, and there is no ground warranting the assumption that, in passing that rate, there was such a violation. For this reason it is submitted that, assuming counsel's entire argument to be valid, it has no application to the case at bar.

Let us, however, assume that our pleading does state a case in which it appears that the municipality, in passing the rates complained of, violated the provisions of the constitution of the State of California. We insist that there is still a showing that the state has acted within the meaning of the fourteenth amendment.

Counsel have, we believe, entirely misconceived the relation which a municipality in California, when exercising its power to fix water rates, bears to the State of

California. As we have already stated, counsel assume that a municipality is, in the performance of that duty, acting purely as an agent of the State of California, and that it is an agent whose authority is limited, and which cannot bind its principal if it acts in excess of the authority granted. If we are to follow counsel strictly, we must concede that, under these circumstances, a municipality is acting as any ordinary agent to whom a principal has committed a certain duty to be performed. Counsel say:

> "It is an elementary principle of the law of agency, hardly necessary to be stated, that an unauthorized act of an agent is not the act of the principal. In other words, the scope of the agent's authority measures the principal's responsibility." (Brief, p. 8.)

We shall first consider the validity of this argument and determine whether a municipality, in the performance of its duty in fixing water rates, is acting as an agent and governed by the ordinary principles of agency, and then discover whether, if the relation of principal and agent be assumed, the municipality is unauthorized to fix confiscatory rates.

NO PRINCIPLE OF AGENCY IS INVOLVED.

A state acts through instrumentalities; it is an entity whose laws can only be passed, and whose acts can only be performed by some human agency. Those acts which are admitted without question to be acts of the state are always, in fact, those of some instrumentality

of the state. Such is the case when a state legislature passes a valid law. So, too, a corporation, while it acts as an entity, does, in fact, act through its board of directors. Such instrumentalities act for and are the state and the corporation, as the case may be. There are no principles of agency involved, for in each case the principal is acting. So, in the case of the state, there is no delegation of power, for the principal itself is the actor. We fully appreciate that the terms "agency" and "an agency of the state" are often employed in cases where the state is acting. More accurate expression would require the use of the word "instrumentality", but in every well-considered case it is apparent that the terms connote no ordinary agency, but simply a means by which the will of the state is expressed. When the instrumentality, upon which the supreme law of the state imposes a duty, acts, the state is, itself, acting. That instrumentality is, for the purposes of that action, the state. Neither of the terms above referred to involves in any way the principle of agency for which counsel contend. In determining whether a state has acted, the theory of agency may become important, but it is only when the instrumentality, which, under the organic law of the state, is given the law making power, delegates to some other body the authority originally granted to it, that such is the case. Such an instance is found when the constitution provides that the legislature shall have power to pass certain laws, and the legislature appoints some other tribunal to perform that very act. The power which it was intended should be exercised by an

instrumentality of the state is, in such a case, actually exercised by an agent of the instrumentality. In that case, as we have said, the principles of agency might be applicable.

Testing the problem of this case by the rule above stated, we find this state of facts: The organic law of the State of California, its constitution, provides that rates to be charged for water shall be fixed by the various municipalities acting through their board of supervisors. Those boards, like the state legislature, derive their power to act directly from the constitution. They are, to answer appellant's contention, removed exactly the same distance from the constitution when fixing water rates that the legislature is when it passes laws. No one has ever contended that a legislature, to whom is given the law-making power of acting for and in the name of the state, does not act for the state, nor that its action is not state action, because, in passing the law whose validity is questioned, it failed to act within constitutional limitations. The state, as has in countless instances been determined, has acted, but it has acted without due heed to the constitution and the law is unconstitutional. So it is in the case of a municipality when it fixes water rates. It is acting under a constitutional grant within the domain of fixing water rates, and when its act is completed, the state itself has acted. Furthermore, the state has *acted*, irrespective of the question as to whether or not the act is enforceable or constitutional. Those are questions which test the correctness of the act, but they are not determinative of its performance. The act is per-

formed when the municipality passes the ordinance, just as it is completed when the legislature passes a law.

Nor does the fact that an action of the state may be declared unconstitutional and unenforceable render the act itself any the less state action. In such a case it is conceded that a law has *prima facie* validity (brief, amici curiae, 37) *until* its unconstitutionality is established, and it is only when the judicial department of the government determines that it is invalid that it becomes unenforceable. If this is so, it is apparent that what we have previously said is true,—the state has acted and its act gets recognition, but, not being within constitutional limitations, it may not be enforced. The judiciary interprets whether checks imposed by the organic law have been heeded, but its decision on that question does not affect the other, as to whether or not the state has acted. That question is tested in an entirely different way. It is definitely answered in the affirmative if it is made to appear that an instrumentality of the state, to which is entrusted the law-making power within a given domain, has acted; while, if the showing is that an instrumentality to which that power was given has delegated to another tribunal, the test then to be applied is as to whether or not the law in question was passed under an assumption of, under color of, or pursuant to authority granted by the state.

Counsel, on the other hand, propose to determine in each case the question, as to whether there has or has not been state action, by ascertaining whether or not the action is or is not constitutional. If it is, then they

concede that the state has acted; if it is not, they declare that there has been no state action. The vice in this method of reasoning is that it tests each action by its legality.

It is our contention that, in every instance where the organic law of the state imposes upon a certain body the broad power and duty to act within a certain general field in the state's behalf, and leaves to that body a discretion as to the exercise of the duty, that act, if so performed, is the act of the state. That contention is, we submit, fully supported by the authorities. In no federal case which has come to our notice has an act, alleged to be that of a state, been determined not to be such, where the act was performed by an instrumentality of the state to which the organic law gave the power to perform an act with regard to the subject matter concerning which it, in fact, acted. In such a case, the test of agency has never been applied. Such an act has, however, definitely, and in numerous cases, been determined by the Supreme Court of the United States to be that of the state.

In *Ex parte Commonwealth of Virginia,* 100 U. S. 339, 25 L. Ed. 676, that court, speaking through Mr. Justice Strong, said:

> "We have said the prohibitions of the 14th Amendment are addressed to the states. They are: 'No *state* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.' *They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be*

> *taken.* A state acts by its legislative, its executive or its judicial authorities. *It can act in no other way.* The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it."

The portion of the opinion above quoted was expressly referred to and approved by Mr. Justice Matthews in

> *Neal v. Delaware,* 103 U. S. 370; 26 L. Ed. 567.

In discussing the same subject in

> *Chicago, B. & Q. Ry. Co. v. Chicago,* 166 U. S. 226; 41 L. Ed. 979,

the same court speaking through Mr. Justice Harlan said:

> "It is not contended, as it could not be, that the constitution of Illinois deprives the railroad company of any right secured by the 14th Amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative,

executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' "

The language above quoted received a fourth approval in

Raymond v. Chicago Union Tr. Co., 207 U. S. 20; 52 L. Ed. 78,

where the court by Mr. Justice Peckham said:

"The claim that the action of the state board of equalization in making the assessment under consideration was the action of the state, and if carried out would violate the provisions of the 14th amendment to the constitution of the United States, by taking property of the appellee without due process of law, and by failing to give it the equal protection of the laws, constitutes a federal question beyond all controversy.

* * * * * *

"The state board of equalization is one of the instrumentalities provided by the state for the purpose of raising the public revenue by way of taxation.

* * * * * *

"*Acting under the constitution and laws of the state, the board therefore represents the state, and its action is the action of the state.* The provisions of the 14th amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever, by virtue of public position under a state

government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state."

THE MUNICIPALITY WAS ACTING WITHIN ITS POWER.

If, however, it is assumed that the City and County of San Francisco was acting as the agent of the State of California, it is equally apparent that the action of that municipality in enacting the ordinance complained of was action by the state. Conceding for the moment the correctness of the theory contended for, we find a case in which the state has, in its organic law, provided that that municipality shall fix rates to be charged for water within its limits. Full authority to act for the state with regard to that subject matter is given and the broadest discretion is imposed.

The only question as to the validity of the exercise of the power thus bestowed arises because of the following provisions of the state constitution.

Article I, Sec. 13:

> "* * * No person shall * * * be deprived of life, liberty, or property without due process of law. * * *"

Section 14:

> "Private property shall not be taken or damaged for public use without just compensation. * * *"

How either of these provisions may be said to constitute a limitation upon the "power" of the state to enact a law, it is difficult for us to appreciate. The aim of these provisions was not to limit the power of the state but to defend the individual. They supply a means of protection to the individual against unjust encroachment upon his rights, but they do not pretend to, nor do they, limit the power of the state to act. They do not even say that the state shall pass no law which shall violate certain guaranties, but they say that those guaranties shall not be violated. In the very nature of things those guaranties cannot be violated until the law complained of is *enforced.* An ordinance by its mere passage deprives no one of his property; it is its enforcement which works the injury. So, if the legislature passes an unconstitutional law, we cannot say that the state has not acted but only that that law, because of its unconstitutionality, shall not be enforced. The constitutional provisions referred to are, in other words, not limitations upon the authority of the state, but checks upon the enforcement of laws which it may enact.

Were this not so, however, and were they, as counsel put it, in the nature of a "general order to agents", it is submitted that the state has still acted. Full power to act is given with an order that the action shall not, if enforced, result in depriving an individual of property without due process of law,—in other words, that the state shall not act illegally. The principal is in effect attempting to protect itself by instructing the agent not to break the law. Such an instruction, coun-

sel themselves concede, does not serve as a protection in case legal requirements are not observed. They say (brief of amicus curiae, page 30):

> "No one would contend that the law of the state should be read into and become a part of a private principal's instructions to his agent, thereby limiting the powers of the agent. If that were true, no agent could ever violate the legal rights of another person by authority of his principal. 'The bane and the antidote would go together.'"

The situation is, we submit, not dissimilar to the one where a street railway corporation orders its conductors to run its cars and collect fares, and prescribes a rule, among others, that he shall not eject a passenger who has paid his fare. If a conductor disregards these instructions and does eject a passenger who has paid his fare, his act is, notwithstanding the prohibition, that of his principal and the company is bound. The reasoning is apparent. "Full and plenary power" to act with regard to a certain subject-matter has been given, and any act with regard to that subject-matter is the act of the principal.

We have attempted to meet the general argument of counsel rather than to examine and reply to specific portions of their brief. Many statements which are made therein are on their face inaccurate, as, for instance, the one at page 14, that the ordinance in our case can be determined to be void only "because it is unauthorized and contrary to the supreme law of the state"; but all such statements are advanced in support of the proposition that the relation of principal and agent is involved and that the principles of the law

of agency are applicable. This we submit is not the case.

THE DECISIONS OF THE FEDERAL COURTS.

We believe that what we have already said furnishes a complete answer to the argument of appellant and amici curiae, but we cannot allow certain criticisms of our first brief to stand unchallenged. We are charged first of all with having argued our case without regard to principle and "wholly from the standpoint of authority"; and it is then claimed that the authorities do not support the contentions we have made.

We have no excuse to offer for our belief that the issue now before the court is one to be determined entirely by an application of rules already laid down by federal courts. We have been impressed with that belief from the time the question now under discussion first arose, and we find nothing in counsel's brief to make us change our minds. We submit once again that the decisions of the federal courts furnish a complete answer to the issue now before this court and fully support our contention that the lower court acted correctly in assuming jurisdiction.

Let us examine counsel's ground for asserting that we are wrong in this contention. It is correctly stated by counsel that the case of *Raymond v. Chicago Union Traction Company, supra,* "is much relied upon by appellee" and it is candidly admitted that it is an "authoritative decision which lends support to the case for the appellee". It is conceded that "the point here un-

der discussion was raised in the Raymond case and that federal jurisdiction was declared to exist''. It is apparent that if this decision states the rule by which this court will be bound, the order appealed from must be affirmed. It, therefore, becomes of vital importance to ascertain the reasons urged by counsel for its not being a binding authority in the case at bar. Those reasons are: (1) That the decision announces a different rule from that laid down in *Barney v. New York* and other cases decided by the Supreme Court of the United States; (2) That the action taken was pursuant to the mandate of the Supreme Court of Illinois, had, therefore, received the final sanction of the state, and was state action.

The rule referred to is the one stated in the following portion of the opinion of the court delivered by Mr. Justice Peckham:

> ''The provisions of the 14th amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition, and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state.''

Answering the ground first assigned by counsel in support of the argument that this principle is not the true one, we are forced to meet the suggestion that the decision is inconsistent with other decisions of the Su-

preme Court. We find no warrant for this argument. Language practically identical with that above quoted was used before this case was decided, in three other decisions of that court, and the question of jurisdiction was determined by applying the test approved in this case.

Ex parte Commonwealth of Virginia, supra;
Neal v. Delaware, supra;
Chicago, B. & Q. Ry. Co. v. Chicago, supra.

The rule, thus laid down, plainly is that the state may be said to have acted when one of its instrumentalities, acting within the scope or purpose of its office and with regard to a subject-matter over which it has been given power to act, takes such action as will, if not prevented, deprive a citizen of a right protected by the 14th Amendment.

The rule followed in the Raymond case has not only, in four separate instances, received the direct approval of the Supreme Court, but it is in no way inconsistent with the principles announced in the Barney or Cumberland Telegraph cases. The former dealt with a situation in which the action complained of "was not only unauthorized, but was forbidden by the legislature", and the court found that "the defendants were proceeding not only in violation of provisions of the state law, but in opposition to plain prohibitions". That decision supports the rule of the Raymond case and does not in any way militate against it.

In the Cumberland case, on the other hand, it was alleged that no provision of the state constitution or of the state law delegated the power which the munici-

pality attempted to exercise, and there was nothing upon which to even found a claim that the state had acted. Even in this extreme case the court, speaking through Mr. Justice Lurton, was careful to say:

> "If it shall turn out that the common council did have general power to regulate the charges of telephone companies rendering services within the City of Louisville, and that it has illegally exercised that power, either because it has thereby impaired the obligation of a contract or by imposing rates which are unjust and confiscatory, a federal question may arise."

Counsel's statement that, to accept the doctrine of the Raymond case

> "would make the decision at variance with *Barney vs. New York,* with the later case of *Memphis vs. Cumberland Tel. & Tel. Co.,* and with every other decision where it has been held that one who 'by virtue of public position under a state government deprives another of property', but without authority from the state, does not perform an act constituting state action within the meaning of the Fourteenth Amendment", (Brief, p. 39)

is, therefore, it is submitted, entirely incorrect and finds no support from an examination of the cases referred to. The rule of the Raymond case is the one always heretofore followed and applied.

The second argument of counsel has, it seems to us, even less force than the first. It is true that the state instrumentality had, in this case, before the action complained of was taken, failed to perform the duty of making assessments imposed upon it by the state law, and that the Supreme Court of the State of Illinois

had ordered it, pursuant to mandamus proceedings, to perform that duty. The writ of mandate issued by that court was, however, only an order to levy an assessment. It was not an order to levy an invalid assessment or to levy one similar to the one which was, in fact, finally levied; and the assessment in question because of its illegality violated the mandate of the Supreme Court of Illinois as well as the prohibitions of the state and federal constitutions. How it can, with any foundation of fact, be contended that the act complained of had received the sanction of the Supreme Court or been ratified by the State of Illinois it is difficult for us to appreciate. It is certain that neither the majority nor the dissenting opinion in the Raymond case furnishes any basis for that argument.

That case is the only one of the decisions of the Supreme Court referred to in our brief which counsel have felt called upon to consider. The others they dismiss with the observation "We have neither the time nor the inclination to review all of the cases cited by counsel". We believe that the other seven decisions of that court furnish additional authority for the argument we make.

Counsel do, however, at some length, consider four federal decisions to which we referred:

Citizens' St. Ry. Co. v. City St. Ry. Co., 56 Fed. 746;

Des Moines City Ry. Co. v. City of Des Moines, 151 Fed. 854;

Ozark-Bell Tel. Co. v. City of Springfield, 140 Fed. 666;

Capital City Gas Co. v. City of Des Moines, 72 Fed. 818.

The first of the cases above cited is criticized on the ground that it does not appear that in that case there was a provision in the constitution of Indiana prohibiting the passage of a law impairing the obligation of contracts, and that the claim advanced in the case was only the one that a provision of the federal constitution had been voilated. Conceding that counsel's contentions are correct, they do not, to our minds, weaken the force of that decision as an authority in the case at bar. It is apparent that the situation which the court was considering was practically the one with which this court is now dealing. The provisions of the federal constitution are, and were when this case was tried, the supreme law of Indiana. If the supreme law of Indiana is deemed to contain a provision similar to that of the 14th Amendment, and yet a subordinate instrumentality of that state is held to have acted as and for the state, even though violating the supreme law of the state, it seems apparent to us that a similar act by the same instrumentality would be construed to be state action, were the prohibition against the deprivation of property without due process of law definitely made a part of the state law.

In so far as the three other cases, above referred to, are concerned, counsel do not question that they are in direct support of our contention in this case, but they argue that the decisions are not supported by the au-

thorities upon which they purport to rely. There is no pretense that the cases themselves do not support the argument for jurisdiction. In view of this fact and the authority furnished by the Raymond case and other decisions of the Supreme Court, we shall not lengthen this brief by a discussion of them.

Since our first brief was written, a decision of the District Court of the District of Delaware, which supplies strong support for the contention we have made in this case, has come to our notice.

> *Wilmington City Ry. Co. v. Taylor et al.,* 198 Fed. 159, 169.

Because of the full consideration given to the question now before this court and the satisfactory disposition of arguments similar to those now urged by appellant, we quote as follows from the opinion of Judge Bradford:

> "(2) The utility board is an instrumentality of the state of Delaware for the accomplishment of public purposes and its acts in and about matters committed to it are the acts of the state. The suggestion that in so far as such an instrumentality acts irregularly, wrongfully or illegally it does not represent the state, because the state has not authorized it so to act, is utterly unsound. If it were otherwise the fourteenth amendment would possess no practical efficiency with respect to the action or threatened action by such instrumentality; for no relief could be had under that amendment against irregular, wrongful or illegal action taken or threatened by it, while in the absence of such irregular, wrongful or illegal action there would be nothing to complain of and consequently no occasion for asking or possibility of obtaining relief. The material consideration is whether the state in-

strumentality in denying a person or depriving him of the protection of the amendment is acting virtute officii, or proceeding under the grant of authority given it by the state, or within the general scope of its functions, and not whether in so acting it is acting irregularly, wrongfully or illegally." * * *

"At the conclusion of the hearing on the present application the counsel for the utility board referred to Barney v. City of New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, and Seattle Electric Co. v. Seattle, R. & S. Ry. Co., 185 Fed. 365, 107 C. C. A. 421. The former case does not seem to have any pertinency to that before the court. There a bill had been filed to enjoin the city of New York, the board of rapid transit commissioners, and others from proceeding with the construction of a certain rapid transit railroad tunnel in a place not included in the 'routes and general plan' adopted with reference to the construction of such tunnel, on the ground that it would deprive the complainant of his property without due process of law in violation of the fourteenth amendment." * * *

"The proceeding there sought to be enjoined was not within the grant of authority conferred. But here the utility board, although acting irregularly and wrongfully, was proceeding under the grant of authority given it by the state to 'hear and examine complaints concerning rates * * * and to make such recommendations and orders as it may deem proper concerning such rates.' The distinction in principle between the present case and Barney v. City of New York plainly appears from the latter portion of the opinion in that case. The New York case wholly fails to establish the proposition that the action of the utility board in making the order complained of was not the act of the state. Seattle Electric Co. v. Seattle, R. & S. Ry. Co., 185 Fed. 365, 107 C. C. A. 421, was decided by the circuit court of appeals for the ninth circuit. In the court below a street railway company had

obtained a preliminary injunction against another street railway company, restraining the latter from constructing a railway on Rainier avenue in Seattle, under an ordinance of that city, on the ground that the complainant, which had for many years been operating a line of railway along that avenue under an earlier franchise, would by the ordinance obtained by the defendant and such construction be greatly damaged and deprived of property without due process of law in contravention of the constitution of the United States. On appeal from the interlocutory decree the circuit court of appeals held that the franchise granted to the complainant was not exclusive, and that, as under the franchise granted to the defendant compensation was required to be made for damages occasioned by the laying of tracks, the latter ordinance did not conflict with the constitution of the United States and therefore the court below was without jurisdiction to entertain the suit. But instead of resting the decision upon that ground the court unnecessarily went further and said:" (quoting from the opinion)

* * * * * *

"Several things may with propriety be said of this holding. In the first place, it was wholly unnecessary to the determination of the case; the decision being fully supported on the first ground. Second, the cases cited in support of the proposition do not sustain it. They are Barney v. City of New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, which has already been considered, and Hamilton Gaslight Co. v. Hamilton City, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, where it was held that a city ordinance not passed under legislative authority is not a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts."

* * * * * *

"These two cases fall far short of the proposition advanced in Seattle Electric Co. v. Seattle,

R. & S. Ry. Co., and at the same time are clearly distinguishable from the case in hand. While in those cases there was either a legislative prohibition or a lack of legislative authority to construct the tunnel or pass the ordinance, here there is no question as to the legislative authority of the utility board to regulate rates by making 'such recommendations and orders as it may deem proper concerning such rates.' This distinction was clearly recognized by the circuit court of appeals for the sixth circuit in City of Louisville v. Cumberland Tel. & Tel. Co., 155 Fed. 725, 84 C. C. A. 151, 12 Ann. Cas. 500, where it was held, as stated in the syllabus, that the circuit court of the United States has no jurisdiction to enjoin the enforcement of a municipal ordinance on the ground that it impairs the obligation of a contract or deprives the complainant of property without due process of law, in violation of the constitution of the United States, when the bill alleges that no power had been granted to the municipality by the constitution or legislature of the state to pass such ordinance."

* * * * * *

"As before stated, here the state has conferred authority upon the utility board with respect to the regulation of rates. Third, the proposition advanced in Seattle Electric Co. v. Seattle, R. & S. Ry. Co. seems essentially unsound. While the constitution of a state is, subject to the constitution and laws of the United States, the supreme law of the state, the constitution of the United States is the supreme law of the land, and within the scope of its operation, the supreme law of the state to the exclusion of any inconsistent provisions in the state constitution or laws. The prohibition of the fourteenth amendment relating to due process of law is self-executing and its scope and force can neither be increased nor diminished by any state. But it does not destroy the state or its instrumentalities. In declaring

that no state shall deprive any person of life, liberty or property without due process of law, it prohibits action by the state through any of its instrumentalities which would have that result, and whether the state constitution does or does not contain a similar prohibition is wholly immaterial on the question whether action by a state instrumentality is action by the state and as such forbidden by the amendment. The prohibition of the amendment having precisely the same force and operation in the absence, as in the presence, of a similar prohibition in the state constitution, if in the former case any given action by a state instrumentality would be the act of the state, it would equally in the latter, other things being equal, be the act of the state. The co-existence in the federal and state constitutions of similar prohibitions is unimportant on the question of authority to represent the state, and consequently on the question of jurisdiction of the circuit court, now the district court, of the United States. Fourth, it is difficult, if not impossible, to reconcile the proposition advanced in Seattle Electric Co. v. Seattle, R. & S. Ry. Co. with the fact that the Supreme Court of the United States has in many cases, of which a number have been hereinbefore cited, recognized and upheld the jurisdiction of the circuit court of the United States over suits for injunctive relief against the orders or legislative action of commissions and other state instrumentalities, based on the constitutional prohibition in question, in states creating such commissions and instrumentalities and having a similar prohibition in their constitutions. Illinois, Michigan, Minnesota, Virginia, Washington and other states are in this category, each having the constitutional prohibition that 'no person shall be deprived of life, liberty, or property without due process of law.' Fifth, the circuit court for the northern district of California in San Francisco G. & E. Co. v. City, etc., of San Francisco (C. C.), 189 Fed.

943, repudiated the proposition advanced in Seattle Electric Co. v. Seattle, R. & S. Ry. Co. in a carefully considered opinion by Judge Van Fleet."

As we stated in our first brief on this appeal, we do not feel that the opinion of this court in the Seattle case announces the rule which Judge Bradford thought it did. We think that the decision of the court in that case is sufficiently explained by applying it to an ordinance passed without, and not under color of, state authority, and that it is not an authority for the position of appellant in this case. Judge Bradford, in his opinion, however, has so clearly presented the arguments against the position so taken by the appellant that without regard to his application of this argument to what he conceives to be the rule laid down in the Seattle case, it seems to us that his opinion cannot fail to be of great value in a consideration of the question now definitely raised.

It is respectfully submitted that the order of the District Court should be affirmed.

Respectfully submitted,

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